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International Court of Justice

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OFFICIAL TRANSCRIPT OF THE INTERNATIONAL MILITARY TRIBUNAL IN THE MATTER OF THE UNITED STATES OF AMERICA, THE FRENCH REPUBLIC, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, AND THE UNION OF SOVIET SOCIALIST REPUBLICS AGAINST HERMANN WILHELM GOERING ET AL, DEFENDANTS, SITTING AT NUERNBERG GERMANY ON JULY 25, 1946, 1130-1700, LORD JUSTICE LAWRENCE, PRESIDING.

THE PRESIDENT: The Tribunal will sit on now until one o'clock without any interruption.

I have an announcement to make.

When counsel for the defendant Hess first made his argument the Tribunal directed that he should rewrite it and submit it for the Tribunal's directive that the alleged unfairness of the Versailles Treaty should not be argued.

The argument as now rewritten by Dr, Seidl has been carefully considered by the Tribunal. It still contains many allusions to the unfairness of the Versailles Treaty, irrelevant material, quotations not authorized by the Tribun and other matters which have nothing to do with the issues before the Tribunal. The Tribunal has therefore deleted the objectionable passages and has directed the general secretary to hand a marked copy containing the deletions to Dr. Sei

That is all.

The Tribunal directs Dr. Seidl to get in touch with the general secretary's representative. He will then see the passages which the Tribunal considers objectionable.

Now, Dr. Fritz.

DR. FRITZ (Counsel for defendant Fritzsche): Mr President, Your Honor:

Yesterday afternoon I had commented on the charge that the defendant Fritzsche was guilty of a crime against peace. I had concluded that statement. Now I continue on page 32 of my manuscript.

The next group of accusations levelled against the defendant is for instanc characterized by such terms as: incitement against Jews, incitement against foreign nationas, incitement to explcit occupied territories, propaganda for the "master race".

On the witness stand Fritzsche made a declaration which represents a summary of the knowledge he gained after the collapse and above all here in the court. It ran as follows: An ideology in whose name five million people were

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murdered must not be permitted to survive this event. Now How far did Fritzsch make propaganda for this anti-Semitism? Was he able thereby to forsee this murder, did he approve of it or at least tolerate it? The Prosecution went very far in its assertions. It maintained that Streicher, as "the chief Jew-baiter of all times", could hardly have surpassed Fritzsche in his defamation of Jews. Fritzsche defended himself against this accusation, And rightfully in my opinion we see this quite clearly when we compare the slogans from the arsenal of anti-Semitism, which Sir Griffith Jones read for hours in excerpts from the "Stuermer" at the session of 10 January 1946, with Fritzsche's statements submitted here by the Prosecution. Fritzsche supported by the affidavit of Scharping dated 17 May 1946, was able to point out

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what he undertook against this paper. It must also be noted here that the language and arguments of the "Sturmer" found no echo in any German newspaper or at a single broadcasting station of the national-socialist regime.

Before the war Fritzsche carried on no anti-Semitic propaganda of any kind All the statements submitted by the Prosecution originated during the war. They are, however, not directed against the Jews as a people or as a race, but are related only to the question of the origin of the war. They mention only occasional polemical introduction of the Jewish question in the propaganda battle which was fought in this war alongside the battle of arms. This explains the fact that the radio addresses submitted by the Prosecution never contain more than casual remarks and never speak of the Jews by themselves. Each of his radio speeches may be examined to this effect. Nor does there exist a speech by him which would have dealt exclusively with the so-called "Jewish problem". He never talked on such a subject. Fritzsche always spoke simultaneously of "Plutocrats", "Bolshevists", "Democrats" and used other such phrases by means of which the propaganda of the Third Reich felt obliged to conduct its battle. During his cross examination as witness he dealt in detail with each of the radio addresses submitted in the trial and discussed the reason he had each time for making merely incidental remarks on this subject. An examination of all of his statements over the radio would show that of all the fundamental propaganda subjects of Nazi-ideology, Fritzsche mentioned and advocated anti-Semitism least of all.

This takes all foundation from the conclusions of the Prosecution. For there cannot be any connection between such rare statements on the part of Fritzsche and the murder order given by Hitler. I therefore expressly protest against the accusation that Fritzsche be considered more guilty than those credulous men who carried out the shootings.

In the course of this Trial we have heard many testimonies as to what secret and ultra-secret means and methods were used by the really guilty ones to carry out this horrible murder. So many testimonies cannot be put aside as irrevelent and unreliable. Contrary to former assumptions this trial could have made it clear that there existed only a small group of instigators and initiates. It has not been proved in the least that a man like Fritzsche belonged to this

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closest circle of Hitler's despotism. The trial has even shown that he made t' acquaintance of the majority of his co-defendants here in the dock only.

To draw such far reaching conclusions against Fritzsche would necessarily lead to the assumption that everybody who took a public stand for anti-Semitis as such, if only with reservations, bore the same criminal guilt. The extent of moral guilt is identical with the criminal guilt. And therefore there is no need to discuss here how far a mere error - even a political one - may at the same time become immoral. The accusation, however, of being co-responsible for these murders, was an especially deep blow to Fritzsche.

With regard to this it might be objected that although Fritzsche did not stand very closely to his chief Goebels and to the other heads of the information control, he was yet one of those persons who had access to the foreign press and radio news. This is perhaps the reason why Fritzsche is accused of having had knowledge of almost everything that happened during Hitler's rule.

Fritzsche was able to state in the witness stand and to quote, too, a numb of details, on the point that even with this opportunity his faith was not shaken in the questions which were decisive - perhaps also morally. This no mor enabled him to realize actual happenings than his profession of journalist, which gave him the opportunity to follow up for himself rumours which were appearing. He could not break down by such means the wall which had been erected in front of the misdeeds.

With regard to foreign reports on atrocities and other misdeeds Fritzsche as well as von Schirmeister and especially Dr. Scharping, have stated that the examination by the office "Schnelldienst" (express news service) which was carried out in all cases, resulted time and again in official replies which eliminated doubts as to the inaccuracy of such statements from abroad, This office, the "Deutscher Schnelldienst" (German express news service) - which had an entirely different significance from that claimed by the Prosecution-- was a control agency created especially by Fritzsche in order to have foreign news tested as to the truth of its contents through inquiry at the competent German official agencies. If the Defense had succeeded in submitting the records of this "Schnelldienst" to the Tribunal, documentary evidence could have been offered in every detail for the way in which German authorities answered inquiries of this kind.

For instance the NSDAP knew in a masterly way how to make its replies sound credible. The foreign propaganda which had to serve a definite purpose could on the contrary lay no claim to any great power of persuaison. This all the more since enemy propaganda in war time also brought of course positively incorrect reports, of which fact Fritzsche was often able to convince himself.

Furthermore Fritzsche has been accused of advocating the doctrine of the "MasterRace".

The only statement by Fritzsche himself which the Prosecution submitted in regard to this point, shows clearly that Fritzsche neither championed nor promoted such an idea, that on the contrary, he expressly rejected it. An examination of the quotation presented by the Prosecution does not leave any doubt about it. Beyond that the hearing of evidence -- the witness von Schirmeister and the affidavit of Dr. Scharping -- has shown that Fritzsche prohibited the use of the word "master race" for press and radio altogether. Fritzsche himself under oath termed this assertion nonsensical, Therefore, after thorough examination of all obtainable speeches by Fritzsche I can only state that his charge is untrue. Nothing is changed in regard to this statement by the fact that Foss and Stahel judged differently without giving any concrete facts. I have already dealt with the value of those documents as evidence.

Fritzsche allegedly stirred up hatred against foreign peoples.

To prove this serious charge the Prosecution emphasized several excerpts from two of Fritzsche's radio addresses which were held on 5th and 10th July 1941. In order to be able to understand correctly the circumstances surrounding the speeches, one must take into consideration the dates on which they were held, They were made shortly after the attack on the Soviet Union, He is not charged with any further statements - made for instance at a later time or similar ones which might have shown some kind of system. When the passages cited by the Prosecution were supplemented by the full text of the speeches and by the examination of Fritzsche on the witness stand, it was shown that Fritzsche did not slander the Soviet Union in them. Neither could what had led up to these speeches have given him any reason to stir up hatred against that country. They were held shortly after German sources and in particular war correspondents had reported atrocities in towns in Galicia which had been conquered by German troops

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These were things which were reported everywhere in Germany--and also by forei correspondents--in print, pictures and motion pictures. In this respect there was an especially great volume of material and in his speeches Fritzsche expre ly referred to it. Fritzsche's statements reflect the agitation of the German public over these reports, and he pointed to those presumed to be guilty of th atrocities.

The facts as such were also confirmed by the Russians. The latter added, however, that not the Russians but the Germans were guilty of these actions. What happened was only that on the basis of undeniable facts a controversy had flared up as to the responsibility -- just as happened later in the famous case of Katyn -- in which both sides morally condemned the instigators.

In neither of those speeches, as an examination of their entire contents would reveal, did Fritzsche designate entire nations as inferior or sub-human. Phrases about "Sub-humanity" referred only to those culprits whom in real indignation he pilloried as morally contemptible. He could believe the proofs presented by the Germans, and therefore there is no reason to assume that at th time he held the speeches he could have predicted what actually happened in th East much later. Therefore, there could not have existed any intention on his part to stir up his audience to engage in similar actions. It is impossible to establish any causative connection on the basis of two such words he had spoken once.

The same is true of the excerpts from a speech of 29 August 1939, which General Rudenko read to him during his cross examination. That broadcast also refers to atrocities, committed shortly before the outbreak of the war in Bromm-berg and concerning which on the day of the speech -- that being the reason for it -- an official White Book had been published. The results of an investigation of those atrocities were summarized in it. Only the guilty ones were designated by Fritzsche as inferior human beings. But it is not justifiable to generalize this opinion to such an extent as though he had designated the entire Polish nation as inferior. Fritzsche considered the representation in the official Whit Book as correct. He could not have doubted the fact that Poles had killed Germans. However, no word in that speech allows for the conclusion to be drawn that he took the opportunity or even suggested that the Slavic nations be exterminated. The German people no more than Fritzsche could imagine anything like

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it at that time.

General Rudenko attempted in his cross examination to prove that my client had made false statements. For that purpose an excerpt from his broadcast of 2 May 1940 was presented to him. This is the example I mentioned before for the insufiency of such evidence in general. In it Fritzsche gives a descripti of the towns, villages and hamlets which he had visited shortly before, and which had remained undamaged by war. The Russian Prosecutor pointed to the official report of the Norwegian government onumerating the damages caused by the war. Thus the impression was created that Fritzsche was lying to his audience. The full contents of that speech shows, however, that the quoted sentences regarding undamaged houses in Norway stand directly next to other sentences in which Fritzsche himself depicts the destruction caused by the fighting in Norway.

The statement does not contain a lie if Fritsche has reported in it that in other parts of the country he visited not the slightest trace of fighting was found. His description, therefore, is not in contradiction at all to the Norwegian Government report.

At this place, I should like to insert a few remarks about the case of the "Athenia" and the part that Fritzsche played in this connection, This case shows to what extent Fritzsche was at pains not to retransmit reports until they were proved to be true and reliable. But it shows also how dependant Dr. Fritzsche was on the version of the official German offices. This supports his good faith, for the principle that official announcements are to be believed with absolute faith, which was naturally the reason for his conviction, could not at that time be shaken.

That particular article in the "Voelkischer Beobachter" dated 23 October 1939 has been rightly described in this trial by all parties as contemptible. Now, Fritzsche also engaged in polemics on this point in sharp if not similar terms. I take the liberty of pointing out that such remarks could be morally condemned only if Fritzsche had knwn beforehand that it was actually a German submarine which sank the "Athenia". But as he has testified under oath, this fact first became known to Fritzsche here in Nurnberg in December 1945. Before that, he was precisly the person from whom this decisive circumstance was with-

held, although he had, through the naval liason officer, undertaken investigations at the Naval Supreme Headquarters and other official headquarters concerning statements by foreign reports.

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To support the charge that Fritzsche instigated the ruthless pillage of the occupied territories, the only evidence submitted is a statement made on the 90ctober 1941. In this, a passage from a public speech made by Hitler a few days before is reproduced. I have been at great pains to find an instigation to ruthless pillage of occupied territories in this quotation as well as in the remarks made by Fritzsche about it in his radio address. It is inexplicable to me how any sentence can possibly convey anything to this effect. I can only assume that it is a case of a misunderstanding and leave it for the Tribunal to judge.

In no other connection has Fritzsche spoken a word or given a hint to this effect and, least of all, openly called for such a thing. Moreover, it is to be gathered from Dr. Scharping's affidavit dated 17 May 1946 that the use of any kind of coercive means against other nations would have run counter to the purpose of his whole work, including his work within the Propaganda Ministry, namely to gain the voluntary cooperation of the European populations.

It has also not been proved that Fritzsche knew really more about the manner in which foreign workers were actually recruited. I would point out that the defendant Sauckel stated that he had only one brief and unofficial talk with Fritzsche and that in the beginning of 1945. In his Affidavit Fritzsche, gave further the exhaustive details also on the fact that he obtained extensive material from the competent authorities for notification to the German public, in which the free will basis upon which men were being recruited for employment in Germany was continually pointed out. It is inadmissible that information concerning this was given to the Ministry of Propaganda other than that given by Sauckel in his report to Hitler.

Moreover nothing has proved that Fritzsche approved or used for Propaganda purposes the violations of International Law, already committed or intended, such as the so-called Commissioner's Decree, or the Lynch Law against enemy aviators, who had been brought down. As regards the Commissioner's Decree, the Russian Prosecution charged the defendant that as a soldier, as a member of the 6th Army, he took cognizance of this decree. This has been confirmed by Fritzsche. He could, however, point out that his attitude had not only been passive. He even, as will have to be confirmed, took a successful stand against this by way of proposals to his Commander-in-Chief, witness Paulus. General

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Rudenko's charge, that in spite of this he remained in Hitler's service, although he should at least have assumed that Hitler was the author of such an order contrary to International Law, is not a reason for accusing Fritzsche as a propagandist, or even morally as a man. My Lord Justices! If such an accusation with a criminal legal foundation could be made, it would rest upon every German soldier who fought on for his Fatherland in the East after the autumn of 1942.

Fritzsche also protested against the fact that Allied fliers were treated contrary to International Law. When he learned this, he spontaneously refused any propagandistic activity for Goebbels in this sphere. These facts have been ascertained through his thorough examination on this subject and through Dr. Scharping's Affidavit.

Furthermore, no charges can be made from what he said about the use of new weapons and the "were-wolf" movement in his radio speeches, with which he has been charged by the Russian Prosecution on cross examination.

I can be spared mentioning particulars in this connection, because Fritzsche could testify in detail. The speech of 7 April 1945, with which he is reproached, does not in the least glorify forms of warfare contrary to the International Laws. It rather attempted to find a psychological reason or excuse for the active participation of civilians in the fighting towards the end of the war by referring to the suffering of the German people through the effective air activity of the Allies.

I must only reply to one point of the evidence:

General Rudenko submitted to Fritzsche a short document at the end of his cross examination. It is the question of a copy of a short message, signed by Fritzsche, of 19 October 1944, addressed to Major Von Passavant, a wireless expert of the Propaganda Branch of the OKW. The Russian Prosecution wishes to conclude from the contents of this communication that Fritzsche had committed himself in the preparation and execution of some kind of "biological war." Since a conclusion cannot possibly be drawn from the contents. It is merely a covering message of five lines referring to the transmission of a letter of a radio listener to another department. Fritzsche's department received daily whole bunches of

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letters from unknown radio listeners. A subordinated official looked through such letters, of which hundreds arrived daily, and directed them wherever they would perhaps receive special consideration. Nothing different happened with the letter of the radio-listener Gustav Otto from Reichenberg, which apparently contained a suggestion to carry out "biological warfare." Although Fritzsche signed the transmitting letter composed by thesubordinate official in his capacity of Department Director, he naturally did not know anything about the contents of the listener's letter. With the large number of daily communications from listeners it was completely impossible for him to read them. This listener's letter, in any case did not find any special attention in the Broadcasting Department. The copy of the transmitting letter, as can be seen from pencil notes made thereon, was also immediately put away. How can anything unfavorable be deduced against the defendant Fritzsche from this evidence? Especially since it is completely unknown what the likewise unknown listener meant by a"biological war."

Finally I have yet to point out the following: General Rudenko has read the document on the occasion of the cross-examination, and that from a Russian text. The German text, which appears in this form in the German Transcript on Page 12315, and the English text, which appears in this manner on Page 12606 in the English Record, differ in content considerably from the German original text. If notwithstanding the insufficiency of this document - the meaning of which could in any case be clarified only by the "enclosures" which are lacking - the Prosecution believes it deserves consideration, the first requirement would be to have completely exact translations made from the German original text.

In concluding my extimation of evidence I wish to say: None of the documents brought up during the cross-examination of the defendant Fritzsche could modify the impression which he gave us during direct examinations: To have spoken before this Tribunal in sincerity and truthfully; and that because of his own endeavor to also make by himself every possible contribution so that an actual foundation for a proper judgment may be found. And going even further, all the statements made by Fritzsche were supported in all decisive points by the documents which I submitted, andparticularly

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through the testimony of the witness Von Schirmeister. The latter, who during the most meaningful period of 1938 to 1943 was the daily companion of Goebbels, was able to report directly, and, I dare say, in an observing way, on the actual relations within the Ministry of Propaganda. The result of the evidence - I may repeat here what I expressed in the introduction - was unequivocal for my client. Contrary to the announcement made by Mr. Albrecht at the beginning of my final pleading, nothing during the proceedings could add to the contention that Fritzsche's importance in reality was greater than that diagram of the Propaganda Ministry showed.

The discussion of the bare facts alone ought to have made clear that Fritzsche can in particular bear no responsibility for what is, as far it can be judged from afar, the actual part that may have been played by the extensive apparatus of the whole Third Reich propaganda in the plans and in thehands of a small initiated circle. If the restricted department in which Fritzsche cooperated was misused, Fritzsche himself was exploited. The assumption thatFritzsche was Goebbel's closest collaborator, his right hand man so to speak, and even his acting deputy - an assumption from which the bulk of the accusationslevelled at him are probably derived - is already refuted by the facts that have been discussed. The odium against Fritzsche on the alleged ground that he bears a responsibility equal or similar to that of Goebbels has already been definitely shown by the evidence to be unfounded. Alone, the actual actions and proceedings of my client ought to make it clear that the assertions of the Prosecution have gone much too far.

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In the legal consideration of those acts and measures of Fritzsche by Captain Sprecher, it was quite striking that --- as far as I can see also in distinction to the other defendants --- at only one point was the quite general conclusion drawn that Fritzsche was during a definite period, the principal conspirator, because he was directly entrusted with the manipulation of the press. I need not mention here again that the factual grounds of assumption for such an opinion did not exist. Now I am only concerned with establishing, in view of the legal qualification by the Prosecution itself, that in his declaration his activity should be considered rather in the sense of forms of participation. The speech of the Prosecution points out in several places that Fritzsche had been called to account by this Court because of his aiding and abetting, he is characterized as an "accomplice" of Goebbels, he had assisted in producing propaganda material, he helped in making possible an atmosphere of hate, he had supported and more of the same, thereby stressing that he could not have been among those who did the planning. On the other hand it is said also of this defendant that he instigated and incited thus taking an active part as instigator, stimulator and incitor.

The first question now is: Is the accessory helper also a participator within the meaning of para. 6 of the Charter? This question, it seems to me, has not yet been discussed by Dr. Stahmer. But the case of defendant Fritzsche offers an opportunity for this, because he has been characterized to a particular extent only as an accomplice. I am, therefore, compelled to give the question closer scrutiny. These four concepts: leader, organizer, instigator and participator are said to be equivalent on account of their external composition. The four possible perpetrators must also be dealt with in the same manner. These four concepts, in so far as they differ linguistically, can therefore only explain in what different forms a plot can be fashioned. The one instigates, the other organizes, the one leads the gang, the other takes part in the plot in some other way. Therefore all four conceptions are closely connected with the common plan. They are united only because of the common plan. Only that makes them true accomplices. To jointly make plans, to jointly want to carry something out that is the main concept of these four subsidiary concepts. Only the functions amongst

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themselves can of course be different. They can also be shared by the conspirators themselves. It the conspirators have jointly invented the plan, have formulated it or, by agreement, have merely furthered it, then it should be of no consequence which part each one of them plays in its execution. It should therefore be basically also unimportant whether within this plot someone is the leader the inspirator or merely another participant in this plan. However, everyone presumably will have to participate in this paln. He must have recognized its purpose at least, for according to the words of the charter, he must have "participated" in it and that either

a) in the formulation or

b) in the execution of a common plan or

c) in some other conspiracy for the commitment of an individual crime.

Only then is he responsible for others when in the execution of such a plan, someone commits a crime.

The word "accomplice" refers therefore to the plan. He is an accomplice in the plan and is in no respect different from the leader or instigator. A more far-reaching meaning in an accessory sense must therefore be far removed from this concept.

In common law, the concept of accomplice as main concept has also an altogether different meaning for the accessory. By accessory, according to the common legal conception, only one of the forms of accomplice is understood, and that the form by which an outside deed is only supported or furthered. A deed which the accessory does not exactly want for himself. It signifies the dependence, the accessoriness of the bare support of the main deed. Article 6, last paragraph of the Charter cannot have such a meaning. There the participant is to be put on an equal basis with the accomplice, whereas in common law the accessory, as subordinate participant, can never be accomplice in a punishable deed. In common law the assistants are merely accessories. It cannot have been the intention of the creators of the Charter to regard the mere accessorial assistant as participant in the plan, since whoever participates in a plan is to answer fully for the deeds of others, even if he has only subordinately participated in the formation of the plan. However, on the contrary it must then follow: Whoever does not participate at all in the

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formation or discussion of a common plan can therefore assume no full responsibility for that which others have done. It is thereby a matter of indifference whether the others committed a crime in the execution of a plan or only incidentally upon the occasion of its execution. The responsibility of the one for the deeds of the other can only exist when the plan binds them together. It is for this reason that the concept of conspiracy presupposes of necessity the idea that what is being done takes place under the impulse of a common will and a common knowledge in relation to the plan.

This sense of participation restricted to the plan is, in my opinion, expressed also in other parts of the Charter. Already in Para. 1 -- and not only in Para. 6, Section 1 -- it is mentioned that in execution of the Four-Power Agreement of 8 August 1945, the "principal war criminals", the "principal culprits", the "principal conspirators" or whichever way it is expressed, should to begin with be called to account here before this Court. Assistants, accomplices, simple agents of execution and all other merely dependent, accessorial perpetrators who do not belong to the central body -- that is to say who are not connected with the conspiracy plan or are in closer agreement for the carrying out of a single crime -- cannot be considered as belonging to such a group. Within the meaning of conspiracy and of the substitution of the one for the other connected with it, there can be no simple "helpers" at all.

For the defendant Fritzsche I have demonstrated that he -- owing already to his position in the State and the party structure -- cannot belong either to the restricted group of conspirators nor to the wider group of the organizations. Moreover Captain Sprecher has himself pointed out that Fritzsch is not represented by the Prosecution as the type of conspirator who would have thought out the all-comprehensive strategy. His particular field even lay outside the conclusion of the plan. But it was not necessary to have himself correctly understand the basic strategy to have perceived the aim, when he became the spokesman of the conspirators. I believe that the latter conclusion if the concept of participator in the sense of a conspiracy is rightly estimated, embodies an error of thought. He who stood outside the makers of the plan certainly does not belong to the group of conspirators.

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After these legal arguments which are even supported by the opinion of the Prosecution, I come now to this conclusion. The defendant Fritzsche, against whom it has not been proved here that he took part in any common planning, can on this account also not have been a participator in the alleged conspiracy. At any rate he cannot be punished according to Paragraph 6, last section. According to the intellectual construction of the Charter there should be somewhere a limit fixed concerning the arraignment of a single person in these trials. When is anybody still a participator -- accomplice -- and when is he no more so, but only a perpetrator or accessory? Where is this boundary which sets of the responsibility for individual deeds from the responsibility for that which others have done? Because there must be a dividing line for this collective responsibility also. I mean the common plan is this dividing line. He who does not belong to those who did the planning should also be left out of the group of conspirators.

On the other hand the framers of the Charter provided:

a) establishment of a single individual as criminal culprit even though he does not belong to the group of conspirators and

b) declaration of an organisation as such as a criminal organization.

If the defendant Fritzsche does not belong to the group of conspirators and, as is established, was never a member of even one of the organizations being prosecuted here, he could be convicted only if he as an individual had committed crimes as covered by article 6, paragraph 2, a to c of the Charter. In that case, however, just as in any ordinary criminal procedure, the prosecution must furnish him the proof of a criminal offense. If he does not belong to the conspiracy, if he does not belong to an organization, the Prosecution cannot derive its support from a so-called legal assumption, an assumption merely said to result from membership in an organization. It is not possible to reverse the burden of proof.

The second question then is: Did Fritzsche as an accessorial accomplice or abettor, belong to the class of those criminals of whom it has been proven that they as individuals committed crimes against the peace, a violation of law governing warfare, or a crime against humanity?

He as an individual is not charged to have committed one of these crimes

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with his own hands. The charge is directed against him only by reason of his activity as an accessory.

As far as I can see, the establishment of the concept of the accessorial accomplice is not something foreign to the English and American criminal law. However, the common law is governed by the principle that the accessory falls into the same class as the accomplice, in other words that -- irrespective of the measure of his personal culpability -- he should be punished, in principle, just like the perpetrator. It is said that at all times the English law was inclined to apply the principle of equal punishment for perpetrator and accessorial accomplice. The reason for referring here to the English common law is merely to establish a link with the German concept of law. It is, therefore, sufficient that English law and American law make a differentiation between the concept of a perpetrator and accessory.

On that point however, a decisive difficulty arises, resulting from the fact that there is a difference in the concept of right and of wrong between the Prosecution and the Defendants. The concepts are bound to differ because the Statute Law is not the same.

That is the reason why I cannot as yet conclude my legal argumentation: differences in concept, which may be equally common in both spheres of law, result in different inferences of law as far as Statute Law is concerned.

The British Chief Prosecutor referred to the individual responsibility of each single defendant according to the letter of para. 6, section 2 a to c of the Charter. In that connection he remarked that it is a commonplace in common law that persons who help a criminal and shield him, who give advice and help to a criminal, are criminals themselves. Perhaps he wished thereby to advocate the conception that according to the spirit of the development of English law such persons, by reason complicity in someone else's deed, should be punished in the same manner as the main perpetrator; that the accessoriness of the accomplice -- if I understand Sir Hartley Shawcross

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correctly, is in principle, without importance for consideration by common law. In practical effect this might mean that the difference between the concept of accomplices and accessories plays no part here, or at best might determine the degree of the respective responsibility for the measure of the individual guilt. Is it intended, in principle, to judge him who merely supports the deed of someone else exactly in the same way as applies to him who carries out the deed as his own? I may refer to the effects which such a concept might have on the measure of punishment, for example.

At this point it might be in order to say this: The legal maxim propounded by Sir Hartley Shawcross may indeed by commonplace for every member of the English or American legal professions. This does not hold true for a German defendant, however. As I also infer from the argument of the French Prosecutor, Dubost, this does not seem to hold true for French Common Law, because he pointed out that according to the principle of penal law, strictly speaking, all the defendants could in that case not be considered as main perpetrators but merely as " accomplices." And because the confines of common law concepts are too narrow, it is the opinion of the French Prosecution that the deeds which are to be adjudicated here are not equal to the common law with its rationalistic statics; that it would be necessary to apply a law which goes beyond this.

The concept of conspiracy therefore, - the science of the plot - and the practicability to declare an organization criminal, are to be the vehicle by means of which it will be possible to go beyond the common law. However, how about the case of a defendant who does not belong to the conspiracy nor to an organization? After all, law must be applied! This then leaves nothi but the common law for judging the individual deed. Which law other than general concepts such as, for instance, guilt, dolus, carelessness and also the accessoriness of the accomplice can be applied? It is possible that through the establishment of new

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facts of the case, the Charter created new substantive law. But what is the juridical concept with which to approach these new facts of the case? Classification of actual circumstances will probably have to be made by means of the analogy of penal law concepts. As regards the facts of the case listed in paragraphs 6(b) and (c) of the Charter, these correspond essentially with the facts of a case in common law. A defendant as an individual who did not take part in laying out the plan, and who did not belong to an organization, can then be judged only according to principles which also must apply for every other delict of common law. If concepts such as the accessorical accomplice are involved, argumentation against a defendant can take place according to common law only.

The German legal consciousness has had to face the most complicated legal problems, particularly in connection with the doctrine of the form of participation; in other words with the question as to how an accessory should be classified according to the various possibilities of participation. From this in particular results the decisive question: is it possible that the Charter went so far as - I repeat, what is involved are common law concepts - it is a question here of banning, if possible concepts of common law; of respecting the old established legal concepts of the defendants in judging the accessorial assistants. Is it possible that it entirely ignored even the completely different structure of Statute law?

In view of the utterly different nature of Statute law - especially with reference to the question of accessorial assistance, I ask permission for a few legal dogmatic remarks on the conception of German law. In all fairness and at least as far as the concept of an accessorial accomplice is concerned, a German defendant can be charged only with what is known to the concept of law adopted by his people and which, at the same time, is in keeping, morally, with his sphere of knowledge. That is the decisive point!

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By reason of the provisions of Statute law in paragraph 49 of the Reich Penal Code, there is not only a strict separation between the accessory and the accomplice, as far as the concept is concerned, but necessarily and as a matter of principle he is also to be punished less severely than the perpetrator himself. Jurisprudence and judges, therefore, have made a sharp distinction between the perpetration of an act itself and the mere instigation or support of somebody else's act by accomplices. This distinction is made not only in accordance with external characteristics, and so according to objective factors, but also with regard to what occurs in the mind, and so according to subjective factors. During decades of the German law, particularly in the law of the Reich court, this is expressed in such a way that, in the case of assistance in somebody else's action, the accessory is said to have the animus socii, but the perpetrator himself the animus auctoris. According to German law the assistance is regarded outwardly, which means according to objective factors, only a furthering and support of the action of the principal perpetrator; the accessary must have helped to bring about success by his support. If he has not helped to bring about this success, then he is not an accessary. Then his action is not punishable.

Concerning the mental side of the deed, the dolus, the will of the accessary (animus socii) must be directed to the end that somebody else's action is supported with his knowledge. And so when judging what is going on within the mind of a perpetrator, German law also makes a sharp difference between the will and the knowledge.

And this discrimination is furthermore decisive as to whether somebody has given assistance at all.

I have stated before what Fritzsche was in any way able to know about plans or the execution of them, from the range of his duties. Only if one had proved that he had a definite knowledge and will as an accessary to the fact could he be con-

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demned. It would have to be further proved in the case of defendant Fritzsche whether what he knew and wanted in connection with an alleged furtherance is identical with what any of the main criminals actually did. Only when the knowledge and intent of both agree can one be an accessary at all. In this connection it is to be emphasized than an indefinite knowledge, a very general intent is not sufficient to establish the state of being an accessary. The accomplice must be concretely aware of the elements in a case which another is to carry out in accordance with his intention.

The Prosecution, however, also charges Fritzsche in various points with instigating specific crimes as an accessary. And so the third question is: Has Fritzsche been the instigator of any single crime?

At the beginning of these legal statements, I have already referred to the details of Captain Sprecher's prosecuting speech. To me it is doubtful if here the concept of instigation is meant in the legal-dogmatic sense of the common law. The concept of "incitement" is used essentially to the extent that it corresponds to the German legal concept of mere invitation. This charge of instigation can only be raised insofar as it can be said to concern the individual responsibility of Fritzsche for a specific crime mentioned in Article 6 Paragraph 2A - c. The assumption that Fritzsche was a possible "instigator" to a common plan within the group of conspirators cannot be substantiated in any case, in accordance with what I have already explained at an earlier time.

Instigation as an accessary form of participation in the general legal sense presupposes, however, quite otherwise than in the case of an accomplice, in which a criminal will is only to be supported or maintained, that such a will must first of all be produced in the perpetrator. The psychological influence, unlike that of the accomplice does not consist of affirming or strengthening the individual who has already decided to carry out the deed, but in first producing the will for the deed. The

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means for this can be of the utmost variety, but the perpetrator must first have his mind changed - brought around to it.

Assistance and instigation accord again as accessorial forms of participation, as in the case of instigation, a conscious and in the case of the instigator a designed causative connection must exist between his instigation and the decision of the perpetrator. The principle of equivalence is valid equally as in the case of assistance. The perpetration of a deed must correspond with the conception and the will of the instigator. The instigator is therefore responsible so far as his intention reaches. A possible excessus mandati cannot be attributed to him. From this follows the accessoryship not only of assistance but also of instigation!

The evidence has not furnished the slightest proof to the Fritzsche case htat he has committed an individual crime as instigator through his transmission of news. Nothing has been demonstrated that he has instigated a single person to murder, cruelties, deportations, killing of hostages, massacre of Jews or others, or crimes mentioned in the Charter, or had, as instigator caused a single crime by his transmission of news. Not a single passage from his nearly 1,000 wireless speeches could be produced from which such a conclusion of individual responsibility could be deduced. It could not happen from public speeches. The crimes which were committed were carried out by people completely indifferent to Fritzsche's propaganda. They received their urge or instructions from altogether different sources. These deeds were to be kept quite secret. The official news service should avoid handling this as much as possible. As this trial has shown particularly impressively the perpetrators made the greatest effort to inform a very small circle, for example, of the annihilation of the Jews. What is self-evident in every other State Constitution, namely, that occurences in the country should be handled through the press, was not permissible in a dictatorship. The people should not be asked whether they approve such incidents. The crimes established by this trial

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should not be permitted to be made public. Can one assume that under such circumstances the press and the radio were suitable means to instigate the perpetration of crimes? Is it not more probable that such incidents were kept specially secret from the press and the radio?

In no single case - even if the speeches of Fritzsche were ever so prejudiced - could it be reckoned that through public speeches he could evoke decisions for the perpetration of punishable deeds by a single individual.

Possibly the juridical indications of the Prosecution do not go so far. The Prosecution will reproach Fritzsche that he has contributed to produce an "atmosphere of hate".

Only through such propaganda was it at all possible for gruesome crimes as these to be committed in Germany. This reproach, however, is legally irrelevant. This charge would have legal importance only if the defendant Fritzsche had been among the group of so-called conspirators; if he had been the instigator of a common plan. I believe to have proved that such opinion is impossible. If he had actually brought about an "atmosphere of hate", his instigation of someone else - outside of the group of conspirators - to commit a certain crime would have been impossible legally speaking. Furthermore, according to the provisio of the Statute Law of German Penal Code, a summons disseminated by radio would even exclude facts which the letter of the penal code requires in order to establish the charge of conspiracy. According to German jurisdiction as practiced for decades, there could be no conspiracy, because instigation could not have centered on a certain individual. Furthermore, German Law concerns itself merely with instigation to commit a concrete deed but not with an instigation to commit punishable actions in general. In principle, therefore;

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a summons of some kind, directed towards a group of persons individually undefined, does not constitute incitement to complicity; it is rather outside the framework of legal relevancy altogether. It is quite self-evident, however, that Fritzsche's radio addresses were intended for an entirely unlimited group of persons. Furthermore, and since he was seriously striving to find for the German press and radio propaganda a "foundation based on truth", could he have such an aim to incite to culpable actions? My client admitted in an impressive and unequivocal manner that he followed a tendency which was inkeeping with the official German policy when he passed on the news which he was expected to disseminate. In other words, he did not take advantage of thefact that International Law did not place him under any restraint , and nothing in the evidence submitted has refuted his good faith. However, in the light of thelaw, when it is concerned with incitement to complicity, or with assistance given as an accomplice, good faith is equivalent with lack of will and lack of purposefullness.

This establishes:

1) that the defendant Fritzsche did not belong to the group of conspirators who planned;
2) that he was never at any time a member of a group or an organization which it is here proposed to term criminal;
3) that, factually and for legal reasons, he is not individually guilty of a war crime or a crime against humanity, neither as an accomplice nor according to the letter of law - as an instigator, and not even - also according to theletter of the law - as accomplice.

This will suffice, I believe, for my discussion of the question of evidence and legal conclusions. It is necessary though to mention one other thing: The Fritzsche case has also its human aspect.

Apart from the pros and cons or legal potentialities, another closely related question suggests itself which must not remain without answer: Taking Firtzsche strictly as a human being, can he be expected to have had knowledge, to have been co-originator of all the monstrosities which were established in this Court? According to the interpretation of the Prosecution

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a dolose instrument is (1) the conspirator - of whom Goebbels was perhaps one - : he only who had knowledge of its aims and purposes.

Fritzsche's measures and utterances, however, were not dictated by criminal will. During his examination before this High Tribunal, Fritzsc pointed out the fact thathe does not convoke his duty to obey. But he added that as far ashis own person is concerned a criminal proposition was never made to him. And he furthermore declared: There was no compulsion for anybody to carry out an order in which he could nothelp seeing the intended crime. Undoubtedly, Fritzsche sacrificed his own convictions and had to have recourse to many a compromise. This, however, he did not do where he thought he discovered injustice, violence and inhumanity. As is fitting to a journalist, he examined with care whatever reports reached him from abroad. In disregard to inherent dangers forhis own person, he traced the news which concerned Germany itself, dangers which ambushed every person who tried to penetrate that which absolute secrecy intended to hide. He did not permit himself to be put off with paltry, vague explanations. He reported many details. I merely refer to his visits to Gluecks, Heydrich, and his investigations in the Ukraine.

To the extent that he discovered criminal purposes - such as the "Kommissarbefehl" and the plan to revenge inhumanely the air bombardments on Dresden; he fought againstthem with determination, in the latter case even with the help of a foreign Ambassador. And he was succdssful, too, as these two particularly conspicious examples show. He did this because he followe the voice of his conscience. He did not first engage in lengthy deliberatio as to the pros and cons. As regards the "Kommissarbefehl" he merely had heard of it as a soldier - he hadnever read it, nor did he know that it actually was carried into practice at any time - and he at once raised a protest. When Goebbels ordered him to announce the proposed killing of great numbers of allied fliers he did not mind incurring the anger and the fury of hisMinister. Dr. Scharping described this in detail. When he learn of cruelites in the concentration camp at Oranienburg he even sounded an alarm. The culprits were punished immediately, at that time. Dr. Scharping's affidavits which I submitted, and others, prove his implicit willingness to assist those who were persecuted, for political or racial reasons if they

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applied to him. Most revealing is the tolerance with which he made the continued publication of the "Frankfurter Zeitung" possible. Otherproofs along that line which are also submitted with my Document Book II are not negligible, and in the case of Fritzsche certainly cannot simply be passed over with the comment that with his other hand he "cold-bloodedly" abandoned others to death.

He was not willing to sacrifice his dignity as a human being, not even to the seeming demands of what paraded as idealism, or for the sake of an oath he had taken.

While the Prosecution has tried to darken the picture, I can also point to brighter spots, namely, those which have bearing on him as the representative of propaganda.

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Was he a liar -- and even perhaps a notorious liar? That Goebbels was one is made clear by the revelations of this Trial. And as it was wrongly assumed that Fritzsche was his right-hand man, the implication was of course that Fritzsche had the same attributes. The assumption may be clearly refuted. It is my conviction that, had not Goebbels sought evasion of responsibility in death, we should not now see Fritzsche in the prisoners' dock here as representative of the Propaganda Ministry. The further assumption that all collaborators of Goebbels must have been wittingly at the service of his lies is unjustified. It would only be justified if it had been established here that Fritzsche was in a position to grasp everything including the real and most deep-lying connections. But that could only be determined in this Trial. Fritzsche remained entangled in error like millions of other Germans. Glaring abuses were to be seen everywhere. Fritzsche was not unaware of them. Indeed, he has declined to be characterized before this Tribunal as an opponent of Nazism. He has, however, claimed to have opposed abuses in so far as he could recognize them. This entitles him to be put on a better moral plane.

Neither was he a zealot or a fanatic, possessed only by the idea or adoration of power and success and inaccessible to criticism. Of course, it was a sin, indeed the grievous sin against the spirit, to have served the system. The decisive point is, however, whether he was in a position to detect more than mere abuses. Falsehood nevertheless was already built into the foundation and anything built upon that was bound to be untruthful. It was not only the "thousand door Ministry", as it was once called, that was poisoned. The real reason why everything in Germany was poisoned by falsehood could best be detected by those who lived in a purer atmosphere.

Fritzsche did not even keep immune from the phraseology, but he used it perhaps with better taste than many others. He had occasion to claim here -- and this is no mere empty phrase -- that he has always acted fairly and honorably in every respect in his professional work. Dr. Scharping too has emphasized this in his affidavit. Is this not an indication that he really did not detect that the whole foundation upon which his work was built up was hollow and deceptive? Had he been a professional liar, he would not have

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made a point of doing fine and honest work, that of checking foreign reports and of seeking, in everything that affected him, a truthful basis for the press and radio.

The Prosecution has laid stress upon his rise in the Propaganda Ministry. Did they mean to imply thereby that he was particularly qualified as a liar? Actually, his career -- however modest it was really compared to that of Hitler's other auxiliaries -- has quite another foundation which has also been clearly stated here. He only made headway because he was qualified as a journalist and technician; not because he was particularly good at lying but because he talked better than many others.

As proved by the affidavits of Dr. Scharping and Frau Krueger, Fritzsche lived on a modest scale. During his activity in the Propaganda Ministry he has gathered no riches, possessed no luxurious dwelling; and neither asked nor received any gift. It therefore does not appear astonishing that those who not only heard his voice on the Radio but also knew him personally should have particularly emphasized his human qualities. Dr. Scharping declares in his affidavit: It was a distinction to be allowed to work with him. Is it in keeping with human experience that an impostor should win such consideration? I believe human esteem can only be won by an honest character. Those who are in daily intercourse with a person can find out whether he is a liar or not. And if his speech does not betray him, then his eyes will.

There may be many possibilities of contradicting that somebody who has cooperated in the propaganda of the Third Reich is nevertheless honest and a lover of Truth. The most immediate explanation is probably that which can be taken from Fritzsche's own remark which I repeat here: He said he felt -- and this may well be significant for the verdict if not for history -- that he was deceived by Hitler too!

Before this Tribunal, Fritzsche has not only defended himself but the German people as well. To what extent he is himself responsible to the German people for his persistent and ultimate exhortation to carry on the war to the very end is not a matter to be decided here.

It may be that Fritzsche did not, like others, realize that he was serving an evil cause, or it may be that he did not turn from the State leadership for

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the sole reason that he wished to share the cup of bitterness with the German nation to the last dregs. But guilty in the sense of the accusation brought against him before the Tribunal he is not. I request his acquittal.

THE PRESIDENT: The Tribunal will adjourn until 2:00 o'clock.

(A recess was taken until 1400 hours.)

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AFTERNOON SESSION

The hearing reconvened at 1415 hours, 25 July 1946.

THE MARSHAL: May it please the Tribunal, the defendants Streicher and Raeder are absent.

THE PRESIDENT: The following is the order on the procedure to be followed in the cases against the organization:

First: The Tribunal draws the attention of Counsel for the organization to the Order of July 1st, which directed that any of the evidence taken on commission, which Counsel for the Defense, or the Prosecution, wish to use, should be offered in evidence and thus become part of the record, subject to any objections. It will be convenient to the Tribunal, if it is desired, to offer the whole of the evidence at the outset of the proceedings.

Paragraph 2: The Counsel for the Defense will then put in their Document Books, subject to any objections.

Paragraph 3: The witnesses for the Defense will then be called and examined by Defense Counsel, who will bring out the matters they regard as important, given in evidence before the Commission, and any new relevant matters. Each organization will be dealt with in turn, and the whole of the evidence for that organization, both examination and cross-examination, heard before dealing with the next organization.

Paragraph 4: Counsel for each organization will then make his closing speech, dealing with the evidence given before the Tribunal, and making the necessary references to the documents introduced in evidence. He will also draw the attention of theTribunal to the matters contained in the evidence given before the Commissioners, and in the summaries of the affidavits which he deems important and which he wishes the Tribunal specially to consider.

5. The Counsel for the Prosecution will reply when all the speeches of the Defense Counsels have been made.

6. The Tribunal is of the opinion that the closing speeches of Counsel for the prosecution and the Defense, ought to be short, not exceeding one-half day in each case. If this time is thought to be exceeded, a special application must be made to the Tribunal, stating the grounds for such extension of time,

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not later than Monday next, July 29th, That is all.

THE PRESIDENT: I call on Doctor Seidl for the defendant, Hess.

DR. SEIDL: Mr. President, Honorable Judges. Before beginning with the final plea for the defendant, Hess, I beg the permission of the Tribunal to represent the Defense Counsel for Defendant Goering, and submit on his behalf, two exhibits, which have been allowed by the Tribunal, and they refer to the Catin case, that is to say, the question of the matter of 11,000 Polish Officers in the neighborhood of Smolensk. The first is Exhibit Goering Number 60, an extract from the German White Book. It is the post-mortem examination conducted by the Italian Professor Palmieri and the post-mortem examination conducted by the Bulgarian Professor Borotin, that is Exhibit Goering Number 60. The second is Goering Exhibit Number 61, which is also an extract from the German White Book, which refers to the case of Catin. It is the record of the International Commission of Medical Officers on 30 April 1940. Mr. President, Honorable Judges! When the German people, having lost the first world war, set out in 1919 to rebuild their existence according to Democratic principles, they found themselves facing difficulties which were caused not merely by the war itself and the material loss resulting therefrom. The defendant Rudolph Hess was among the first comrades in arms around Hitler who time and again reminded the German people of the great dangers which would of necessity arise for Germany's domestic and world economy because of the reparations policy of the victor states of 1919. The consequences of that policy were bound to be all the more devastating for Germany when in 1923 France proceeded to military occupation of the Ruhr territory, the center of Germany's economic power. At that time of economic collapse and complete disarmament of Germany, Hitler made the first attempt through the revolution of 9 November 1923 to seize the power of the State. The defendant Rudolph Hess also took part in the march on the Feldherrn Hall in Munich. Together with Adolph Hitler after conviction by the People's Court, he underwent imprisonment at Landsberg Fortress where Hitler wrote his book "Mein Kampf".

When in 1925 the Party was being established again, Rudolph Hess again was one of the first to resume with Adolph Hitler the struggle for national

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rebirth of the German people. During the first years after its re-establishment the Party was to begin its very slow climb. Germany's domestic economy had recovered from the worst effects of the Ruhr invasion. The currency had been established and due to very extensive foreign credits it had even been possible to bring about an economic boom.

Very soon, however, it was to be revealed that the economic progress of the years 1927/1928/1929 in reality was byt illusory prosperity for which in Germany, at any rate, there was no foundation of a sound and well-balanced national economy. It is true that the economic crisis which began in 1930 was a general crisis in world economy and that the decline which Germany experienced at that time was but a part of the general disintegration in world economy. It is just as certain, however, that this was not a question here simply of a seasonal declined within the capitalist economy -- such as had been experienced repeatedly before by individual national economies of countries and by world-commerce, but a case in this instance of structural changes at work which may differ in causes but one of the most important of which undoubtedly was the disturbance in the exchange of products and legal tender caused by the unreasonable reparations policy.

It is just as certain that the consequences of the crisis of the world economy were so devastating in Germany, finally finding expression in an unemployment figure of almost 7 million because the changes brough about in the national economy as a result of reparations payments were particularly far reaching, a fact not of negligible importance. If, consequently, the National Socialist Party won a major electoral victory in the Reich stag elections of 14 September 1930 and entered the new Reichstag with no less than 107 delegates, it is not to be attributed in the last place to the then prevailing economic crisis, to the great unemployment and, indirectly to the economic absurdity of the Reparation payments and the refusal of the victorious states to consent to a new deal despite the most urgent warnings. True, the reparation payments stipulated in the Treaty of Versailles and the mode of settlement were amended by the Dawes and Young plans. It is, however, just as true that these amendments came too late and continued the demand payments

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from Germany to an extent and under conditions which were bound to, and did in fact, lead to an economic catastrophe. In this connection, I must point to the following fact: The Prosecution has produced an extensive amount of documentary evidence in reference to the rise of the NSDAP until its seizure of power. A comparison of the Reichstag mandates in the years ranging from 1930 to 1932 with the unemployment figures for the same period would disclose that the progression of these figures was approximately parallel. The more hopeless the social consequences of unemployment became -- and in 1932, no less than 25 million people, including family members, may be estimated to have been hit by the consequences of unemployment -- the more impressive became the electoral successes of the National Socialists. I hardly believe that the proof of the existence of a casual relation between the consequences of the Reparation policy of the victorious powers of 1919 and the rise of National Socialism can be more convincingly demonstrated. The causal relation may be summed up in a short formula: No Versailles Treaty, no Reparations -- no Reparations, no economic collapse with its particularly catastrophic effects upon Germany, resulting in an unemployment figure of nearly 7 millions -- and without this collapse, no seizure of power by the National Socialists. The political and historical responsibility of the authoritative statesmen of the opposite side as resulting from this causal origin is so crystal-clear that further demonstrations of it are superfluous in the framework of this trial.

This formula may appear constructed and could be carried further to prove that it was not the economic emergency and the high unemployment figure alone which induced millions of Germans to vote National Socialist on the 14 September for the first time and which led to the subsequent progress of the Party's rise to power. Nevertheless, these causes were assuredly among the foremost and even the other causes which played a part in the decision of many voters can be traced back in finality to the fatal effects of the Treaty of Versailles and refusal of the victorious powers -- especially France -- to consent to a revision of the treaty. This applies in the first place to the claim for equality of rights raised by all subsequent democratic governments.

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When the German nation had disarmed in fulfillment of the Versailles Treaty it was entitled to expect the victorious powers to disarm also, in accordance with the obligation assumed by them in the Treaty. This was not carried out and there can be no doubt that their denial of the equality of rights as evidenced by their refusal to disarm themselves, figures amongst the most decisive causes of the rise of National Socialism in the years 1931 and 1932. And if any of Hitler's arguments ever found a respose in the German nation, it was that equality of rights could not be denied in the course of time, even after a lost war, to a nation like the German nation with a population of over 75 millions situated in the heart of Europe and with a cultural past of which few other nations can boast. It has already been remarked in this room that a nation which has produced a Luther, a Kant, a Goethe and a Beethoven cannot be indefinitely treated as a minor nation.

Again and again Hitler had occasion to remark upon the fact that the statesmen of the Weimar Republic left no method untried to arrive at a peaceful revision of the more unbearable clauses of the Treaty of Versailles. For eight years the statesmen of democratic Germany, a Stressmann, and a Bruening, went to Geneva to obtain at last the repeatedly promised equality of rights for Germany and they were repeatedly sent home with empty hands. The dangers produced by this situation could not remain concealed to anyone. In fact, the world was warned by German statesmen, as well as by shrewd politicians of Germany's former enemies. All these warnings were scattered to the winds.

When finally in 1932 the National Socialist Party with 250 seats in the Reichstag had become by far the strongest party in Germany, it could only be a question of time until Hitler and his party would be entrusted with the taking over of government leadership. In the long run this could be avoided all the less since the previous governments of Herr von Papen and General Schleicher had no worthwhile following in the Reichstag at their disposal and exercised their governmental authority exclusively by the means of emergency decrees in accordance with Article 48 of the Weimar Reich Constitution. When on 30 January 1933 Adolf Hitler was actually appointed Reich Chancellor by Reich President von Hindenburg and was entrusted with the formation of a new cabinet, then this was done altogether according to the clauses of the Reich Constitution.

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At the Reichstag election in 1932 the National Socialist Party collected in its favor so many votes as had not been accomplished by any party since the existence of the German Reich. If the leader of this strongest party was entrus ed with the formation of the cabinet, then this was, particularly in view of the parlimentary conditions prevailing in Germany at that time, by no means extraordinary and there cannot be the slightest doubt that Hitler and his party came to power legally, that is according to the Constitution. However, it is correct that in the course of the following years the constitutional structure of the German Reich and particularly Hitler's position, underwent a change. There is, however, no evidence on hand that this development as well was not legal.

In order to avoid repetition I am hereby referreing to the statements of the witness Dr. Lammers .

In this case it may be left completely undecided whether one wants to declar this development to Hitler's absolutely autocratic rule by the creation of a so-called common law or whether one avails oneself of another theory. For the scope of this trial it seems to me much more decisive that not a single nation with which Germany maintained diplomatic relations raised any objections whatsoever or even drew diplomatic or international legal conclusions neither at the seizure of power nor on the occasion of the transformation of the constituti onal structure carried on openly before the entire world. Neither at the seizure of power nor at any later period was the question of diplomatic and internationa legal recognition of the National Socialist State in doubt.

In addition, may it merely be pointed out that the law, which in the following period was to be of the greatest importance for the relationship between citizen and state, was still issued by Reich President von Hindenburg pursuant to Article 48 of the Reich Constitution. I have in mind the decrees of the Reich President for the protection of the people and state, dated 28 February 1933 (Reichsgesetzblatt, part 1, page 83). In article 1 of this decree the pertinent basic laws of the Weimar Constitution were voided and curtailments of personal liberty, the rights of free speech, including freedom of the press, the right to organize and assemble, interference in the privacy of the letters and mails, telegraph and telephone, orders for searching of homes and confiscations. aswell as limiting property were declared valid, also outside of the legal limitations otherwise designated for it.

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From a formal viewpoint there can be just as little doubt about the validity of this decree as there can be about any other so-called constitutional or basic state law issued by the Reichstag, the Reich Cabinet, the Ministerial Council for Reich Defense, or by Hitler himself.

Gentlemen of the Tribunal:

On behalf of the defendant Rudol Hess I have already stated that he assumed the full responsibility for all laws and decrees which he has signed in his capacity as the deputy of the Fuehrer, as Reichsminister and member of the Ministerial Council for Reich Defense.

I have refrained from presenting documentary evidence in reference to accusations which, as a sovereign state, merely concern the domestic affairs of the German Reich and have no bearing on the crimes against peace and crimes against the laws of war asserted by the Prosecution. I shall, therefore, now also only touch on such laws and constitutional and political measures which have some recognizable connection with the actual counts of the Indictment and the common plan or conspiracy asserted by the Prosecution.

The Indictment accuses the defendant Rudolf Hess of have sponsored the military, economic and psychological preparations for war and to have participated in the political planning and preparation of wars of aggression. As evidence for this assertion, the Prosecution pointed to the fact that the defendant Rudolf Hess, in his capacity as Reich Minister with Portfolio, cosigned the law of 16 March, 1935, for the reconstruction of the armed forces. This law reintroduced general conscription in Germany and stipulated that the German peace army was to be divided into 12 corp commands and 36 divisions.

For this trial the proclamation which the Reich Cabinet directed to the German people in connection with the publication of this law and which was placed ahead of the law in the Reichsgesetzblatt, appears to me no less important than the contents of this law. I refer to the contents of this proclamation which has been presented as an exhibit.

This proclamation of 16 March, 1935, contains no essential arguments on this question which had not already previously been brought out by the democratic German government at the time of the Weimar Republic.

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Your Honors, the Tribunal has permitted me at least to read some of my brief in connection with this question. With reference to the fact, however, that defense counsel for defendant von Neurath has already referred to this question in detail, I shall merely refer to his argument in this connection and I shall therefore forfeit, on my part, coming to that question in detail once again.

I shall continue, however, on page 19 of my script and begin with the fourth last line.

The re-introduction of general military service by the law of March 16, 1935, is apparently not considered in the Indictment as a punishable offense in itself, but only as part of the general plan asserted by the Prosecution, which is claimed to have been intended to commit crimes against peace, against the rules of war and against humanity. Whether such a plan ever existed at all whether and to what extent the defendant Rudolf Hess was involved in it and what part the re-introduction of general military service may have played in both an objective and a subjective way, I shall take up in detail later.

Within the scope of the common plan, of having planned and prepared a war of aggression, the defendant Rudolf Hess is also accused of having, in his capacity as deputy of the Fuehrer, set up the foreign organization of the NSDAP, the National League for Germans Abroad, the German Eastern League, the German-American Bund and the German Foreign Institute. The documents submitted by the Prosecution in this connection are not able to furnish proof to the effect that the defendant Hess himself issued directives or orders to these organizations, which could have caused them to pursue activities similar to those of a fifth column.

The testimony of the witnesses Bohle, Strochlin and Alfred Hess has, on the contrary, proved that the defendant Hess, in particular, forbade these organizations and leaders in the most definite way to interfere in the internal affairs of other countries. The Prosecution has not been able to prove in any way that the above named organizations had actually developed activities which were aimed at undermining the structure of foreign states from within.

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Under these circumstances it is superfluous to go into the activity of the above-named organizations and establishments in more detail, all the more so that there is nothing at all tending to prove that there was any causal connection between the tasks and functions of these organizations and the events which later led to the outbreak of war in the year 1939.

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The Prosecution furthermore tried to prove that defendant Rudolf Hess also took a decisive part in the occupation of Austria on 12 March 1938. I do not intend to enter into details of the history of the annexation and to consider from the legal point of view the facts which actually led to the annexation of Austria to the German Reich in the year 1938.

In order to save time, again I shall refer to the extensive statement made by the Defense Counsel for the co-defendant Dr. Seyss-Inquart, and I shall now continue in my brief on page 23, beginning with paragraph two.

Whatever now concerns the participation of the defendant Rudolf Hess and the Party in the execution of the annexation, the evidence has shown here only that the annexation of Austria was an incident which did not have anything to do with the National Socialist Party in the Reich as such. It is sufficient to refer in this connection to the testimony of the defendant Goering and to that of Dr. Seyss-Inquart on the witness stand, which shows that the question of the annexation was solved exclusively by the Reich; that is, therefore, by state authority and not by the Party.

If any doubts should still have existed about this, then they are removed by Document USA-61, PS 812, presented by the Prosecution. It deals in this case with the letter of the Gauleiter of Salzburg, Dr. Friedrich Rainer, to Reich Commissinner District Leader Josef Buerckel, and in which he states, among other things:

"Soon after the seizure of power in the Eastern Province, Klaussner, Globocnik and I flew to Berlin in order to give a report to the deputy of the Fuehrer, Party Comrade Rudolf Hess, about the incidents which led to the seizure of power."

A report naturally would not have been required if the deputy of the Fuehrer and the Party itself had been directly and decisively participating in the solution of the annexation question. I do not mention this in order to give reasons of justification or excuses on behalf of the defendant Rudolf Hess. The findings are rather made exclusively in the interests of the historical truth.

I now come to the question of the Anschluss of the Sudetenland.

Three and one half million Sudeten-Germans were incorporated into a state

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with eight and one half million Czechs and Slovaks, without being granted a decisive influence on the state. All attempts of this national group to receive autonomy within the Czechoslovakian state structure remained without success. When the question of annexation with regard to Austria was solved, it could not but happen that the future position of the Sudeten Germans, which after all consisted of three and one half million persons and whose membership in the German nation is beyond any doubt, was also subject to a test.

Now, I do not have the intention to take a stand in all questions of the annexation of the Sudetenland to the Reich in the actual and legal respect. In view of the fact that the Prosecution in the Trial Brief which it presented before the Tribunal against the defendant Hess treated the Sudeten German question and has also presented several documents as evidence, it appears necessary, in spite of all, to take a brief stand concerning them.

In document 3258-PS, GB-262, it deals with a speech of the deputy of the Fuehrer at the meeting of the Foreign Organization of the NSDAP on 28 August 1938. The latter takes a stand in the Sudeten German question in only general statements and that under emphasizing the principle of nationalities and the right of self-determination of the nations. Also the remaining documents presented by the Prosecution, USA-126, USA-26, do not show on which a decisive participation of the defendant Rudolf Hess in the solution of the Sudeten German question could be based.

However, the extent of this participation can be completely ignored, as the annexation of the Sudetenland to the Reich cannot in itself be a charge of a criminal act according to international law. After all, the annexation of the Sudeten province was not carried out on the basis of a one-handed act of Germany or on the basis of a perhaps disputable agreement between the German Reich and the Czechoslovak Republic. The annexation, rather, took place on the basis of an agreement which had been concluded in Munich on 29 September 1938 between Germany, the United Kingdom of Great Britain, France and Italy. In this Treaty exact and very detailed agreements were reached about the evacuation of the territory to be ceded and the step-by-step occupation by German troops. The final determination of the frontier was carried out by an international committee.

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Without wishing to go into further details, it can still be said with certainty that this is a treaty which had been concluded on the basis of a free agreement of will and that all those participating maintained the expectation that it might provide the basis or at least a considerable prerequisite for an improvement of international relations in Europe.

I am now coming to another point of the Indictment. As well within the limits of the Indictment as a whole, as also in the personal accusation raised by the Prosecution against the defendant Rudolf Hess, the latter is accused of having participated in the outbreak of war and of being responsible for it. The defendant Rudolf Hess actually did take a stand in several speeches on the question of the Polish Corridor and the problem of the Free State of Danzig. In this case, however, the following still has to be stated:

Through the establishment of the Polish Corridor, not only the right of self-determination of the nations was violated -- after all, more than one million Germans came under Polish domination in this manner -- but in excess of this through the partition of the state territory of the German Reich into two areas completely separated from each other, a condition was established which was not only contrary to all economic common sense but which, in excess of this, had to become the cause for constant discord and incidents from the very first day on. Indeed, from the day of the signing of the Versailles peace treaty, the demand for a revision of the treaty, especially in the question of the Polish Corridor, has never been silenced at any hour. There was no party and no government in Germany which did not acknowledge and demand the necessity of a revision of the treaty, primarily in this point. It cannot be the subject of any doubt that, if Poland ought to have an independent access at all to the Baltic Sea under all circumstances, this problem could have been solved much more sensibly than by the establishment of the so-called Corridor and the thereby conditional partition of the German Reich into two areas which were completely separated from each other.

Something similar applies with regard to the status of the Free State of Danzig on the basis of international law and state sovereignty. It is not necessary to regard the facts more closely in this case, which in the course of time have led to constantly increasing difficulties and which in the end caused

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a situation which made a change of the position in regard to international law and state sovereignty of this purely German city necessary.

It is just as unnecessary to go into closer details with regard to the minority problem which was raised by the Polish Corridor and the establishment of a Free State of Danzig. The fact is that in the course of two decades, no less than approximately one million Germans were forced to leave their settlement area and especially under circumstances which could not remain without effect on the general political relations between the German Reich and the Polish Republic. It is also not as if the problems which have been raised here have been publicly discussed only since the coming into power of Adolf Hitler.

If I have understood the Tribunal correctly, the subsequent pages up to and including page 29 are to be eliminated.

Under these circumstances, it could not surprise anyone if after the seizure of power through Adolf Hitler and his party, the questions caused by the Polish Corridor and the separation of Danzig from the Reich were subject to an examination anew. This was all the less avoidable since after the conclusion of the German-Polish Treaty in the year 1934, Poland's attempts to exclude the German element to a continually rising extent did not stop in any way.

I do not intend to occupy myself anymore closely with the negotiations which were conducted by the German Reich with the Polish Republic, the aim of which was to find a modus vivendi under consideration of the justified interests of Poland. In any case, it appears important to me to keep the following facts in mind, and this seems to be essential for the reason that the Prosecution stated again and again that the German Government was obliged to do everything to clarify these questions and that, especially, the German Government was obliged to conduct negotiations and that the one thing that they should not have done was to start a war. The following statements are to show that it was indeed attempted to solve the problems throuh negotiations, the problems that could not be forgotten and which had to be brought to a solution.

For the first time the Reich Minister for Foreign Affairs discussed in the course of a conversation with the Polish Ambassador on 24 October 1938 the

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questions caused by the Corridor and the separation of the City of Danzig and suggested a solution which was to be based on the following foundation:

1. The Free State of Danzig returns to the German Reich.

2. An extra-territorial Reichsautobahn belonging to Germany and likewise an extra-territorial railroad with several tracks would be constructed across the Corridor.

3. Poland likewise obtains an extra-territorial road or Autobahn and railroad and a free port in the Danzig area.

4. Poland receives a guarantee of disposal for her goods in the Danzig area.

5. The two nations recognize their common frontiers (Guarantee) or the territories of both sides.

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6. The German-Polish Treaty is being extended by 10 to 25 years.

7. Both countries include in their treaty a consultation clause.

The Prosecution itself submitted to the Tribunal the reply of the Polish Government to this proposal. The document is TC-73 No. 45, which describes the attitude of the Polish Foreign Minister Beck of 31 October 1938 and his instructions to the Polish Ambassador Lipski in Berlin. In this document the German proposal is flatly turned down on the ground that "any attempt to incorporate the Free City of Danzig into the Reich would invariably lead to a conflict, and the resulting difficulties would not merely be of a local nature, but would prevent any possibility of Polish-German understanding in all its aspects."

In fact, such also was the stand taken by the Polish Ambassador during another conversation between him and the Reich Foreign Minister on 19 November 1938. Asked about the Polish Government's attitude regarding the German proposition of an extra-territorial arterial motor road and an extra-territorial railway through the Corridor, the Polish Ambassador declared that he was not able to make an official statement.

It is impossible to deny that the proposal made by Germany was very restrained and contained nothing incompatible with Polish honor or the vital interests of that State. One should be the more willing to admit this, as the creation of the Corridor and the separation of East Prussia from the Reich was really felt by the German people as the hardest of the territorial burdens of the Versailles Treaty. If, nevertheless, the Polish Government turned this proposal down, for reasons leaving hardly any prospect of finding a solution in subsequent negotiations, the conclusion could be drawn that at that time already Poland altogether lacked a sincere wish for an agreement, which would take into consideration Germany's legitimate interests. This impression was confirmed by the negotiations during the visit

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of the Polish Foreign Minister Beck to Berlin, on 5 January 1939, and the return by the Reich Foreign Minister to Warsaw, on 21 January 1939. If, in spite of this hostile attitude of Poland the Reich Foreign Minister repeated the proposition made on 24 October 1938 in another meeting with the Polish Ambassador on 21 March 1939, this must lead to the conclusion that the German Government was sincerely desirous of solving, by means of negotiation, the questions relative to the Corridor and the separation of Danzig. Thus it cannot be seriously denied that the German Government tried to solve the Danzig question and that of the Polish Corridor by negotiation and that it made very moderate proposals in that respect.

The reply to the German proposals of 21 March 1939 was a partial mobilization of the Polish armed forces. It need not be defined as to what was the connection between the partial mobilization ordered by the Polish Government and the British proposal for consultation, dated 21 March 1939, and whether, incidental to the transmission of this consultation proposal in Warsaw, the declaration of guarantee of 31 March had already been promised or contemplated. There can be no doubt, however, that the partial mobilization of the Polish armed forces, as also admitted by the British Prime Minister Chamberlain in a declaration before the House of Commons on 10 July 1939, was bound to do anything but create favorable prerequisites for further negotiations. As a matter of fact, the subject of the memorandum of the Polish Government handed by the Polish Ambassador Lipski on 26 March 1939 was a complete rejection of the German proposal. It was declared that extra-territoriality for the highways could not come into question, and that a reunion of Danzig with the Reich could not be considered. In the conversation between the Reich Foreign Minister and the Polish Ambassador, which followed the handing over of the Memorandum, the latter declared openly that it was his unpleasant duty to point out that to pursue further the German plans, particularly insofar

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as they had a bearing on the return of Danzig to the German Reich, would be tantamount to a war with Poland.

If I have stated that the connection between the partial Polish mobilization of 23 March 1939 and the Polish memorandum of 26 March 1939 containing a complete rejection of the German proposal on the one hand, and the proposed British guarantee-pledge of 31 March 1939 on the other hand remains undecided, this appears justified with regard to the proposed "formal declaration" made by the British Government as early as 21 March in Warsaw, as well as in Paris and in Moscow. This " formal declaration" was to announce the opening of immediate discussions on measures of mutual resistance against any threat against any European state. Furthermore, the speech by Prime Minister Chamberlain on 17 March in Birmingham, and the speech of the British Foreign Minister Lord Halifax of 20 March in the House of Lords, reflected a point of view bound to encourage the Polish Government all the more towards stubbornness. As a matter of fact, the proposed step of "a mutual formal declaration" already proposed by the British Government to the Governments in Warsaw, Paris and Moscow, proved to be the opening of extended discussions whose purpose it was to place an iron ring around Germany. It was thus clear from the outset under such conditions bilateral negotiati ons between the German and the Polish Government promised but little success, in any case as long as these discussions lasted. In another Memorandum handed to the Polish Foreign Minister on 28 April 1939, already submitted by the Prosecution, the German Government nevertheless once more explained its attitude completely and established once more its readiness for further negotiations. Contents of this Memorandum, including proposals made in March 1939, were announced publicly by Adolf Hitler in his speech delivered in the Reichstag on 28 April 1939

In reply to the Memorandum of the German Government of 28 April 1939, the Polish Government transmitted on 5 May 1939 a Note Verbale which has also been submitted by the Prosecution.

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The contents of that Note Verbale contained even more emphatically a complete rejection of Germany's proposition for solving the p problem of the Corridor and the Danzig question.

Negotiations which began on 21 March 1939 between London, Paris, Warsaw and Moscow for the purpose of establishing an alliance exclusively directed against Germany, did not proceed as desired. Nor was it possible for the French and British Military Commissions, sent to Moscow on 11 August 1939, to eliminate completely the difficulties arising from evidently far-reaching differences of opinion. It need not be established how important was the fact that Poland, which was to obtain a guarantee by England, France, and the Soviet Union, publicly refused to accept military assistance from the Soviet Union. It also remains uncertain whether it is correct what the Soviet Foreign Commissar Molotov asserted during the emergency meeting of the supreme Soviet on 31 August 1939 to the effect that England had not only dissipated Poland's apprehensions, but that, on the contrary, had furthered them. It seems more important to examine the fundamental differences of opinion.

And now here I was going to refer to an extract from the well-known book written by the former British Ambassador in Berlin, Sir Neville Henderson. In consideration of the fact that the Tribunal does not desire to have this quotation read, but that on the other hand during the taking of evidence this extract had been admitted, I shall confine myself merely to refer to it, and I shall proceed on Page 38, beginning with the second paragraph.

Meanwhile, the following actually occurred:

At the 18th Congress of the Communist Party on 10 March 1939, the President of the Council of People's Commissars of USSR, Stalin made a speech in which he intimated that the Soviet Government considered it possible or desirable to reach a better understanding even with Germany. Hitler understood this hint perfectly well. Foreign Commissar Molotov expressed similarly

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himself in his speech before the Highest Soviet on 31 May 1939. Thereupon the discussions between the German and the Soviet Governments were followed by the conclusion of a German-Soviet Trade and Credit Agreement. This Agreement was signed in Berlin on 19 August 1939. But already during these economic negotiations, questions of general political nature were discussed which, according to the Soviet Russian News Agency "Tass" of 21 August 1939, made known the desire of both parties to bring about the change of their policy and to ban war by the conclusion of a non-aggression pact. This Non-aggression Agreement was signed in Moscow in the night from 23 to 24 August 1939; therefore, as shown by the presentation of evidence in this trial, the attack of German armies against Poland was ordered two days before.

Besides this Non-aggression Agreement, a "Secret Supplementary Protocol" was signed as an important part of the former. On the basis of the presentation of evidence, especially on the basis of the affidavit of ambassador and Chief of the legal department of the Foreign Office, Dr. Friedrich Gaus, on the basis of the testimony of State Secretary in the Foreign Office Baron von Weizsaecker, and on the basis of the statements of the defendants von Ribbentrop and Jodl, the following contents of the secret supplementary protocol can be considered as established:

In the case of territorial-political reorganization in the territories belonging to the Baltic States, Finland, Esthonia and Latvia should fall into the sphere of interest of the Soviet Union, whereas the territory of Lithuania should belong to the sphere of interest of Germany.

For the territory of Poland, the division of spheres of interest was made in the manner, that the territories lying to the east of the rivers Narev, Vistula and San should fall to sphere of interests of the Soviet Union, whereas the territories lying to the west of the demarcation line determined by these

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rivers should belong to the German sphere of interest. In other respects, an agreement was reached concerning Poland that both powers would come to a mutual understanding about the final settlement of questions concerning this country. With regard to the Southeast of Europe, the limits of spheres of interest of both sides were made in the manner, that the Soviet side stressed its interest in Bessarabia, whereas the German side declared a complete political disinterest in this territory. According to the testimony of several witnesses, but especially on the basis of the statements by Ambassador Dr. Gaus and State Secretary von Weizsaecker it is established that this secret agreement included in it a complete new settlement concerning Poland and the future fate of the Polish State.

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The efforts to come anyhow to an understanding with Poland with regard to the question of Danzig and the Corridor made after the conclusion of the German-Soviet Non-Agression agreement and of the Secret Supplementing Protocol belonging to it failed. The Pact of Assistance which was made on 25 August 1939 between Great Britain and Poland did not prevent the outbreak of the war, but simply delayed it for a few days. I have no intention to go into particulars of the diplomatic negotiations which were conducted after the conclusion of the German-Soviet Agreement of 23 August 1939, so that an agreement can still be obtained. One thing, however, can be said with certainty: Should the one-sided guarantee declaration of England of 31 March 1939 show that it raised the already existing stubbornness of the Polish Government against the German offers, then an Assistance Pact with Great Britain would operate quite certainly against a readiness to negotiate on the part of the Polish Government. The failure of the negotiations which were carried out between Germany and Poland can surprise all the less, when one bears in mind that the testimony of the witness Dahlerus before this Tribunal. Had not this witness confirmed that the Polish Ambassador in Berlin, Lipski, declared on 31 August 1939 that he is not interested in discussing the proposals of the German Government? He based this negative attitude on the statement that in case of war, a revolution will break out in Germany and the Polish Army will march towards Berlin.

Whatever the news might have been which induced the English Government to conclude the treaty with Poland and which possibly intimated at a rift in the German-Italian alliance and at symptom of deterioration in the German State structure -- and here I refer to the testimonies of the witnesses Dahlerus and Gisevius -- the future will prove that such ideas were not based on any facts.

When on 1 September 1939, war broke out between Germany and Poland, it was at first the question of a localized conflict between two European states. But when Great Britain and France

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declared war on Germany on 3 September 1939, this conflict expanded into a European war, into a war, which as all modern wars between great powers indicated from its very beginning the tendency of developing into a world war because of the presently insufficient international organization and the complete collapse of the system of collective security. This war was to bring immeasurable suffering for all humanity, and when on 8 May 1945 the European war found its end with Germany's unconditional surrender, it left behind a Europe in ruins.

Adolf Hitler did not live to see Germany's collapse and unconditional surrender. Twenty-two former leaders of National Socialist Germany stand before the bar of the Tribunal in order to answer charges of having committed crimes against the peace, against the rules of warfare, and against humanity in the execution of a common plan.

The so-called London Agreement of 8 August 1945 concluded between the Government of Great Britain and Northern Ireland, the Government of the United States of America, the provisional Government of France, and the Government of the Union of Socialis Soviet Republics, is the basis of this trial. The present Tribunal was created pursuant to this agreement, the composition, competency, and tasks of which were established by the Charter of the International Military Tribunal, which is a considerable part of the agreement concluded by the four mentioned Government on 8 August 1945.

The Charter of the International Military Tribunal, though does not only contain the regulations dealing with its compositi competence, and tasks; besides those, it includes - and these are the most important parts of the Charter - the regulations of material-juridical contents. This applies above all to Article 6, which contains the definitions of crimes against the peace, war crimes, and crimes against humanity, with all the characteristic facts of the case. Paragraph 3 of Article 6 of the Charter, which enumerates the characteristics of the so-called conspiracy

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in detail, has to be considered above all as the penal facts of the case. Furthermore, Articles 7, 8, and 9 of the Charter are to be considered as material-juridical regulations.

The subsequent part of my brief was not allowed by the Tribunal. It deals principly with the contents of the statement made by the defense at the beginning of this trial on the 21st of November; and therefore, I need not read them.

I continue on Page 40, with the last paragraph.

In the indictment the defendant Hess is charged with having supported the seizure of power of the so-called Nazi conspirators, the strengthening of their control over Germany, and furthermore the furthering of the military, economic, and psychological preparations for war. He, moreover, is charged with having participated in the political planning and preparation of wars of agression and of wars in violation of international treaties, agreements, and assurances, and in the preparations and planning of the foreign political schemes of the so-called Nazi conspirato

THE PRESIDENT: This ought to be a convenient time to break off.

(A recess was taken)

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DR. SEIDL: Your Honor:

Count I of the indictment refers to the so-called commonplan of conspiracy. According to it, all the defendants and various other persons have participated for a number of years prior to 8 May 1945 in the planning and execution of a common plan as leaders, organizers, instigators, and collaborators. This plan aimed at and brought about the commitment of crimes against the peace, of crimes against laws of warfare, and against humanity. It is asserted that the defendants planned, prepared, unleashed, and directed wars of aggression, and committed war crimes and crimes against humanity in the execution of this common plan.

While the Charter only knows three specifications of crimes - crimes against the peace, against the rules of warfare, and against humanity - the indictment contains four of them. In the indictment the common plan or conspiracy is made an individual and independent count of the charge, without the Charter bringing forth sufficient reasons for this. It may be left undecided whether conspiracy is considered a particular type of crime according to Anglo-American law. In view of the fact that the Charter rejects the use of both Anglo-American and continental law, but has established its own standards of law, and these "sui generis", only the text and spirit of the Charter itself is decisive.

According, however, to what is expressly stated in Article 6, paragraph 3, of the Charter, regarding the outlining of execution of a plan for the perpetration of a crime against peace, against the customs of war, or against humanity, it cannot be subject to any doubt that there cannot be an independent state of criminality as stated in Count 1 of the indictment under the heading of Concerted Plan or Conspiracy. In all events, not according to the principle of the provisions of the Charter.

After the defendant Hess has been charged with all four counts of the indictment it is necessary first to answer count 1 of the indictment:

The indictment places at the centre of the incriminated concerted plan or conspiracy the National Socialist "German Labor Party" of which Adolf Hitler had become the leader in 1921, and which the defendant Rudolf Hess also joined as early as 1921. Even the indictment does not, apparently, claim that the party program of the NSDAP was actually criminal in itself.

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It appears all the less necessary to probe further into this question, as in the subsequent routine of political life the party program has not by any means played the part which could probably be supposed. Moreover, the appraisal of evidence has definitely revealed, as far as the position and rise of the NSDAP is concerned, that up to 20 January 1933 the National Socialist Party was a party alongside other parties; that it has fought with the same legitimate means as other parties for the attainment of its objectives; and that not least among the factors of its rise is that Germany experienced, in 1932 - 1933, as a consequence of the reparations policy of the victor powers in 1919, an economic and social decline of uncommon magnitude; and that, finally, on 30 January 1933, the Party, as the strongest, was entrusted with the formation of the Government in application of the provisions of the Reich Constitution and its leader, Adolf Hitler, was nominated Reich Chancellor.

During the so-called period of struggle, the Party, like all other parties, openly fought for the principles it represented, and the Prosecution could not admit in evidence a single argument which allowed the conclusion to be drawn that by using illegal means the Party and its leaders had been participators in a common plan aiming at launching a war of aggression. In fact, one has to keep in mind only the political, economic, and military condition of Germany in the first years after the end of World War I in order to recognize how mistaken the acceptance of such a plan aiming at starting a war is for that time. The conception put forward by the indictment reveals not only an entirely false idea of the economic, political, and military conditions which Germany faced as a consequence of the peace settlement by Versailles, but this conception also discloses complete failure to appreciate the intrinsic virtue of any policy.

When Adolf Hitler had been appointed leader of the strongest party by the Reich President Von Hindenburg on 30 January 1933 as Reich Chancellor, it was necessarily out of the question for him and his Government, in which other parties participated, to start drafting a common plan aiming at a war of aggression, being not abreast with political, and above all, economic conditions. The problems which the GermanReich Cabinet faced at that time resulted directly from the fact that up to 7,000,000 unemployed people in

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Germany had to be put to work. As the witness Dr. Lammers stated, the elimination of economic and social distress actually was the most important question at the first Cabinet session. There was no question at all of a common plan aiming at launching a war of aggression and, in fact, it is inconceivable that in the circumstances at that time even one member of the Government could consider such an idea in some concrete shape. Furthermore, it has been established through the testimony of Dr. Lammers and other witnesses, that the subject matter of the first cabinet meeting and the resolutions there passed are contained in the governmental declaration of 1 February 1933, made known to the German people in the form of a manifesto of the German Government.

According to the indictment abrogation of the armaments restrictions imposed on Germany through the Versailles Treaty was the first aim of the conspiracy charged by the Prosecution. I have already expressed my opinion on that question. The final refusal of the victor powers to disarm in their turn, according totheir pledge, has at least accorded the German Reich the right to obtain an equalization of armament through its own rearmament. This was not done in secrecy by any means, but in public, through the announcement of the reintroduction of the Draft Law on 16 March 1935. The Prosecution has not been able to show evidence for its assertion that this law was connected with, and was part of, the common plan aimed at bringing about a war of aggression. The exclusive purpose of the law was rather to reestablish Germany's right to equality at least for that question, sixteen years after the end of the First World War. In that connection brief reference is appropriate to a document which the Prosecution produced, together with nine other documents, so-called key documents, and which first of all serve the purpose of establishing the proof for existence of the common plan claimed in the indictment. This is the written record on a discussion at the Reich Chancellory of 5 November 1937, USA-25, 386-PS.

As it is known to the court, this is not a literal reproduction of Adolf Hitler's statements, but a report of Colonel Hossbach which was drafted by the latter 5 days later, viz, on 10 November 1937. I have no intention of entering any further into the contents of this document. I refer here to

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the statements which other defense counsel have made on this question. I only mention that when addressing this speech to the Commanders-in-Chief and the then Minister of Foreign Affairs, Hitler had a chronological plan in view which reveals no conformity whatever with the subsequent events. In these circumstances the existence of a determined and well-outlined plan by Hitler himself even seems very unlikely. Only one conclusion can, with certainty, be drawn from the contents of this document: namely, that until 5 November 1937 Hitler himself only thought of an amicable settlement of the territorial problems raised by the Versailles Treaty. For this reason, therefore, there can have been no question of a common plan aiming at the launching of a war of aggression -- at least, up to this time.

This document, however, is still worthy of notice for another reason: The report begins with the Fuehrer's assertion "that the subject of today's conference is of such importance that its discussion in other states should belong to the Forum of the Government Cabinet. He (The Fuehrer) however, considering the importance of the matter, refrained from making it the subject of discussion in a full session of the Reich Cabinet". First of all, it can be left undecided in how far other questions from 1937 on were still dealt with by the Reich Cabinet in Cabinet sessions, or in the so-called circulation procedure; in the administrative procedure or in the legislative way. The conclusion can, however, be drawn with certainty by reason of the total outcome of the presentation of evidence and in particular by reason of witness Dr. Lammers' statements and other witnesses, but also from a great number of documents submitted by the Prosecution itself that at the latest, from 5 November 1937 on, all problems concerning the question of war and peace were no longer dealt with by the Government as State Authority, nor by another larger circle of collaborators remaining almost the same, but exclusively by Adolf Hitler himself.

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In all probability this situation already existed in the year 1933.

In this connection, I should like to draw attention to the statements of several defendants in the witness box wh , for example, were informed of the reoccupation of the demilitarized zone of the Rhineland in the same way as any other citizen, i.e., by means of the press and radio.

It is certain, however, that all important political and military decisions were taken by Adolf Hitler alone after 5 November 1937, and particularly after the so-called Fritsch crisis and the change of the Reich War Ministry into the High Command of the Wehrmacht which it involved. According to witness Dr. Lammers's statements, general conferences between the Reich Government, the Supreme Party Directorate and the Generals never took place. According to the statement of this witness and others, it was rather that a closer connection never existed between these three institutions. Indeed, not a single one of the documents submitted by the Prosecution reveals anything which might cause us to admit the existence of an independent collaboration between the Reich Government, the Supreme Party Directorate and the Reich War Ministry or afterwards the High Command of the Wehrmacht and the Commanders-in-Chief of the Wehrmacht Branches and their Chiefs of Staff. On the contrary : If a positive conclusion can really be drawn from the presentation of evidence, it is that the power was concentrated exclusively in the hands of Adolf Hitler, that the Reich Government, the Supreme Party Directorate and the Wehrmacht received their orders and directives only from him; that it was Hitler's own policy to prevent a working and independent combination of these institutions.

It can thus also be explained that in all questions of a political or military nature, only those offices were included which had directly to do with the task to be carried out. It is clear from all the documents submitted by the Prosecution that, as a rule, at the conferences presided over by Hitler, there was no question of conferences as is customary in parliamentary Democracies, but they were essentially only concerned with the issuing of orders.

It is not necessary to examine in detail the statements on their relation to Adolf Hitler made by nearly all the defendants ;

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nor is it necessary to define an attitude towards the statements on the attitude assumed b a whole series of other witnesses regarding Adolf Hitler', position in the German Governmental system. One thing can be said with certa ty : At the latest, from 5 November 1937, on, Hitler's position was so commanding and his treatment of all decisive political and military questions so free of doubt that for this reason alone, there could be no grounds left for the acceptance of a common plan.

The defendant Rudolf Hess, though the Fuehrer's Deputy and the highest political leader for Party matters, did not contribute to nor take part in any of the conferences or any other important political or military decisions characterized by the Prosecution as being essential to prove the existence of a common plan, just as little as he contributed to or took part in the conference of the Fuehrer in the Reich Chancellory on 5 November 1937 (USA 25 The same holds good, for example, for the next exhibit USA 26 (388 PS) submitted by the Prosecution.

This is the case of the most important case "Gruen" Czechoslovakia. Without having to enter any further into the details of this document, it can be said without more ado that it deals only with what is entirely the work of the General Staff, which was originally intended as a draft, and afterwards elaborated into a real operational plan. This operational plan was not put into action, the documents referring to case Grune, on the contrary, concluding with direction No. 1 of the Fuehrer and Supreme Commander of the Wehrmacht, which refers to the occupation of the Sudeten German areas separated from Cezchoslovakia by virtue of the Munich Agreement f 29 September 1938. In these circumstances, it is superfluous to deal further with the letter of the Chief of the High Command of the Wehrmacht to the Fuehrer's Deputy of 27 September 1938, which is also contained in the documents for the Gruen case and refers to the carrying out of mobilization measures which were to be effected without the issuing of a mobilization order or a corresponding code word.

What I have already said concerning Document USA 25 holds good in the same way for Document USA 27 (L-79). This is another so-called key document having as subject the instruction of the Commanders-in-Chief of the Wehrmacht Branches and the Chiefs of the General Staff by the Fuehrer in the new Reich Chancellory on 23 May 1939.

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Without intending to enter into the importance or the value of this document as evidence, the Fuehrer's speech closed with the order to set up a small Reserach Staff in the High Command of the Wehrmacht; this document shows clearly that no common plan in the shape asserted by the Prosecution can have existed, especially not between the defendants now facing their trial. Not a single Minister or official of civil administration took part in this conference at the Fuehrer's Headquarters --which in reality was not a conference but an insturction and issuance of orders.

The next three documents submitted by the Prosecution as key documents refer to one and the same subject, namely to Adolf Hitler's speech addressed to the Commanders-in-Chief of the Wehrmacht on 22 August 1939. The following documents are in question : USA 38 (L-3), USA 29 (TS 798) and USA 30 (TS 1014). I will not enter any further into the value of these documents as evidence, although it is obvious that these cannot be equivalent documents, and though it is quite clear that a corresponding reproduction to some extent of Adolf Hitler's expositions is out of the question. None of these document reveal their authorship. Moreover, the statements differ considerably one from another as far as volume and contents are concerned.

Document USA 29 seems to contain the most complete reproduction of Hitler's statements. And here again the conclusion is most worthy of notice, a conclusion which throws some light upon the situation at that time and defines the event which made it possible for Hitler to make such a speech to the Commanders-in-Chief. Quote : "I was convinced that Stalin would never accept the English offer. Russia is not interested in the maintenance of Poland and then Stalin knows it means the end of his regime, it being immaterial whether his soldiers come off victorious or vanquished. Litvinow's solution was decisive. I gradually changed Russia's attitude in this matter. In connection with the commercial treaty we engaged in political talks. Proposal for a non-aggression pact. Then came a general proposition from Russia. Four days ago I took a special step which caused Russia to signify her willingness to conclude it, yesterday. The personal contact with Stalin is established. Von Ribbentrop will conclude the Treaty the day after tomorrow. Poland is now in the position I wanted her in ....." "End of quotation. Besides the Commanders-in-Chief, no minister or leader of the Party, specifically

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not the defendant Rudolf Hess, attended this speech of the Fuehrer.

The same holds good for Document 789-PS (USA 23). The subject of this document is a discussion with the Fuehrer on November 23 rd 1939. It appears from this document that here again only the commanders-in-chief of the Wehrmacht were assembled to receive the Fuehrer's directions for the imminent operations in the West.

The next key document is Exhibit USA 31 namely, directive No. 21 for the Barbarossa case. This was a question of a directive by the Fuehrer and Supreme Commander of the Wehrmacht which had an exclusively military character and was intended only for the sphere of the Wehrmacht. Any participation by civilian administrative offices or of the Party, even in the person of the highest political leader, namely, the defendant Rudolf Hess, is excluded from the frist by the nature of this directive.

It appears also from document USA 32 (2718 PS) the subject of which is a file memo on the result of a conference on 2May 1941 about the Barbarossa case, that neither the deputy of the Fuehrer nor any other political leader took part in this conference.

The last so-called key document to discuss is USA 33 (1881 PS) an account by Ambassador Schmidt of the conversation between the Fuehrer and the Japanese Foreign Minister Matsuoka in Berlin on April 4th 1941. By the very nature of this conference there could be as a matter of course, no question of any participation in it by the defendant Rudolf Hess or by any other political leader of the Party. However, something else appears from this document namely, the fact that it is not only false to talk about a common plan within Germany aiming at a war of aggression but, even more that this, that no kind of close political or military cooperation existed between the so called Axis powers, in any case as far as the relations between Germany and Japan are concerned.

What conclusion can now be drawn from the contents of this so-called key document which the prosecution itself has characterized as particularly relevant as to the existence of a so-called common plan ? Without wanting to express a view as to the material relevance of these documents, in any case it is established by these notes that the defendant Hess was not present at any of these conferences or when these orders were issued.

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If, in appraising this circumstance, one considers the further fact that the defendant Rudolf Hess was the Fuehrer's deputy and therefore the highest political leader, and that furthermore, after September 1st, 1939, he was designated as the Fuehrer's successor after the defendant Hermann Goering, there would not seem to be in fact any place for the assumption of a common plan in the form asserted by the prosecution.

In this connection, may I refer to the report of the Chief of Staff of the United States Army to the Secretary of War for the period from July 1, 1943, to June 30th 1945. I quote : "The proofs at hand show that Hitler's original intention was to create a Greater German Reich that would dominate Europe by absorbing the Germanic peoples in the countries bordering on the German Reich and by strengthening these new boundaries. For the achievement of this aim Hitler pursued a policy of opportunism by which he succeeded in occupying the Rhineland, Austria and Czechoslovakia without military resistance. "No proof has yet been found that the German High Command had an over-all strategic plan. The High Command did fundamentally approve Hitler policy, but his impetuous strategy outran Germany's military capacities and finally led to Germany's defeat. The history of the German high command since 1938 is full of constant personal conflicts in which Hitler's personal orders increasingly prevailed against military judgment. The first clash occurred in the year 1938 and ended in the mismissal of von Blomberg, von Fritsch and Beck, and in the elimination of the last important conservative influence on German foreign policy,

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"The campaign in Poland, France, Norway and the Netherlands resulted in serious dissensions between Hitler and the generals, with regard to details in the execution of the strategic plans. In every case, the general staff favored an orthodox form for the offensive, whereas Hitler was for an unorthodox attack, the objectives of which lay deep in enemy territory. In every case, Hitler's idea prevailed and the really amazing success of each of these successive campaigns raised Hitler's prestige to a point where one no longer dared to oppose his views. His military self-confidence became boundless after the victory in France, and henceforth he began to criticise and disparage his generals' way of thinking even in the presence of junior officers. So the result was that no opposition was brought forward by the general staff when Hitler made his fateful decision to advance against the danger threatening in the east.

"By Italy's entrance into the war, Mussolini intended to realize his strategic plans for the expansion of his empire under the cover of the German military successes. Field Marshal Keitel states that the Italian declaration of war was in contradiction with the declarations made to Germany. Both Keitel and Jodl agree that it was not desired. From the beginning Italy was nothing but a burden for the German war potential. Because of her dependence for oil and coal, Italy was a constant source of friction in the economic field. Mussolini's one-sided campaign against Greece and his attack on Egypt forced the Germans into the Balkan campaign, as well as into the African campaign and led to an overstraining of the German forces which became one of the chief factors of the German defeat.

"Moreover, there is no evidence whatsoever of a strategic planning between Germany and Japan. The German general staff recognized the fact that Japan was obligated by her neutrality pact with Russia, but hoped that Japan would tie up strong, British and American land, sea and air forces in the Far East . . . . "

The statements of the defendants Keitel and Jodl, which they have made on the witness stand are essentially the same as the statements of the American chief of staff, so that further details on this point are superfluous. It may be considered as proven that not once did a complete agreement exist

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among the most intimate circle of Adolf Hitler's associates on the measures to be taken in the political and military field, whereby, first of all, the constitutionally established relationship of rank between the officers of the armed forces and the head of the state and supreme commander need not be considered. One sees: that the existence of a common plan aiming at war cannot be accepted even in the case of that group of persons for whom it first seemed most likely.

The second, common goal of the conspiracy is declared by the indictment to be the appropriation of the territories which Germany had lost as a result of the World War of 1914-1918. The preamble to the Treaty of Versailles provides for the possibility of a revision of the Treaty. Going beyond this, the demand for the reunion of Austria to the German Reich and the annexation of the Sudeten German regions cannot in itself be concluded to rest on the existence of a plan which was to have been realized at the proper moment by the use of violence or by way of war. As a matter of fact, by a disregard of the right of self-determination of nat ns,these territories had already been prevented in the year 1919 from annexing themselves to the German Reich. On this question I can refer to the statements I made at the beginning. Actually, the annexation of Austria took place -- this can perhaps be said as a result of the presentation of evidence --under circumstances which cannot be described as warlike and which permit the conclusion that the greater part of the Austrian population approved the annexation. Concerning the Sudeten-German question, it suffices here to refer to the Munich agreement between Germany, Great Britain, France and Italy by which the reunion of the Sudeten-Germans with the Reich was settled.

And finally, the third aim of the common plan was described as the annexation of additional territories on the European continent which should serve the conspirators as "Lebensraum." The indictment is very unclear in this point and lacks every substance. But in fact the question of the so-called "Lebensraum" is a problem which is completely independent of the National Socialist ideology and is determined bythe size of the area and number of inhabitants. Every German Government had to and must deal with this question. If any argumentby Hitler found a lasting response in the German people, it was the demand made by him for an appropriate share of the German people in the

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material wealth of the world. This demand appears to be all the more justified, as the proportion between the size of the area and the number of inhabitants was more unfavorable for the German people than for any other people.

I do not need to give detailed reasons in what insufficient way the most important sources of raw materials are distributed and that certain raw material are completely monopolized. It is certain that the bitterness about the unjust distribution of the material wealth of the world had to increase in the German people, as not only every reasonable revision was rejected, but moreover it was said by the opposite side in an unmistakable manner that the nations were divided into two classes, namely the "haves" and the "have-nots." In fact, this classification could be felt as nothing else than ridicule. Moreover, even after 1933 there was no unanimous opinion about the possible solutions concerning the removal of the difficulties resulting from the need for space. So as, for instance, the defendant Rudolf Hess belonged precisely to those who wanted to solve the problem of "Lebensraum" by the acquisition of colonies if possible. For instance, in a big speech in Stettin, on 21 March 1936: "The natural way to make more food available for the people of Germany, to improve our living standard, is to supplement it by having colonies. Therefore, the Fuehrer by stating his willingness to return to the League of Nations, connected with this the expectation that the question of colonies would be submitted to examination. The Fuehrer knows, that a people without a sufficient area, without a sufficient food basis, a hungry people must in the long run become a center of unrest because of its instinct of self-preservation against which the most ingenious statesman is powerless. For hunger is a natural instance which cannot be subdued either by warnings or by others. Our desire for colonies is therefore only the desire for a pacification of Europe for a long time, and therefore the question of the allocation of colonies to Germany is part of the Fuehrer's big proposal of pacification...."

The connection between the unjust distribution of the material goods of the world which contradicts all economic reason and the political tensions which shake the peace of the world again and again, cannot simply be overlooked.

Your Honors, I now turn to the legal evaluation of the state of affairs which may be considered as actually established: As I have already stated, article 6, paragraph 3, of the Statute is not the standardization of an own

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and independent state of criminality, but the expansion of the criminal responsibility of the leaders instigators, and participants who have taken part in the drafting or in the execution of a common plan for the committing of a crime mentioned in paragraph 2. According to the menti ned regulation, these persons are to be responsible not only for the acts which they themselves have committed, but they also are to take upon themselves the penal consequences for all acts which were committed by any person in the execution of such a plan.

In article 6, paragraph 2a, of the statute the fact of a crime against the peace is defined as follows: "The planning, the preparation, the initiation, or the execution of a war of aggression or of a war which violates international treaties; the conclusion of agreements or the giving of assurances, or the participation in a common plan or in a conspiracy for the execution of one of the above-mentioned acts."

While it is expressly defined in article 6, paragraph 3 of the statute that the criminal responsibility of the participant in the draft of a common plan is limited to acts which "have been committed by any person in execution of such a plan", the crime against the peace is according to article 6, paragraph 2a, of the Statute already completed with the "conclusion of agreements or the giving of assurances or the participation in a common plan or in a conspiracy for the execution of a plan which has as its aim the preparation or initiating or execution of a war of aggression." In contrast to article 6, paragraph 3, it is here not necessary that an act of execution is actually committed.

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I do not intend now to deal with the question more specifically whether the war as such and especially the start of a war of aggression was a crime according to international law valid at the time of the day of the outbreak of war, on 1 September 1939. This question has already been discussed in the opening speech of the defanse. This examination of the legal side of this question has shown that neither the League of Nations agreement nor the Briand-Kellogg Pact contain anything which would allow the conclusion that the starting of a war was a criminal and therefore punishable offense. Valid International Law knew neither a criminal responsibility of the state as a body corporate and even less a criminal responsibility of theagencies of the state, such as the head of the state, the members of the government, the military commanders, the economic leaders, etc.

It can also be left undecided to what this unsatisfactory condition of international law had to be traced back. It already was correctly pointed out that the idea of sovereignty in the refusal of the greatpowers in particular to relinquish some of these rights of sovereignty in the interest of a better super-national organization, also were a reason for the unsatisfactory status of the international law especially in this question. In connection with it there is another fact which does not seem to be less important to me, namely that it was not possible until now to create an effective organization and a procedure which would guarantee a real satisfaction of the justified claims of the peoples for a proper participation in the material goods of the world, and which would also in other respects take care of a just settlement of the conflicting interests.

Already on the basisof these establishments and examinations there can hardly be any doubt that a crime against the peace, as it has found its factual definition in article 6, paragraph 2a, of the statute, does not exist. This section of article 6 of the statute does not have asufficient basis in existinginternational law.

DR. SEIDL: I omit the following important statements as well as the following statements concerning the secret German-Russian treaty of 23 August 1939, which deals with the jurisdiction of the Tribunal. The Tribunal has to consider officially whether the jurisdiction still exists concerning this

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this secret treaty. I continue on page 63. Herr President, I am in a difficult position, as by omitting these statements on pages 59 to 62, an incorrect picture would be created, as my real statements concerning this secret treaty could be misunderstood, also its legal consequences. I therefore ask the Tribunal to decide.

THE PRESIDENT: The Tribunal has fully considered this matter and does not desire to hear your point.

DR. SEIDL: Moreover, the following is to be said about Article 6, Paragraph 3 of theCharter:

The constitutive facts of a conspiration, as they have been expressed in Article 6, Paragraph 3, area typical institution of Anglo-American law. The Continental-European law does not know such a state of criminality. But there cannot be any doubt that international penal law, insofar as there exists any in therestricted and actual sense, and if one does not understand in it the standards which are to be observed in the application of national or foreign law, also does not know the concept of conspiracy as a criminal state of facts.

But it is not only the qestion of the prevailing international law and the concordance of the Charter with the same, which is to be put to test. The issue is rather also the answering of the following question:

In the opening speeches of the four chief prosecutors and also in the discussions prior to the trial concerning the legal bases of the trial, two entirely contradictory arguments were introduced. While some argued that the Charter was a complete expression of the prevailing international law and was in agreement with the common legal conviction of all members of the international legal community, the others asserted that it was one of the main tasks of the International Military Tribunal now being instituted to develop international law further. This latter conception for instance, stands out clearly in the report ofthe American Chief Prosecutor to the President of the United States of 7 June 1945. Here it is stated verbatim among other things: "In initiating this trial, we must also remain aware of the aims with which our people assumed the burdens of war. After we entered the war, and our men and our wealth were mobilized to eradiciate this evil, there was the general feeling among our people that out of the war there

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should arise unmistakable rules and a practical machine from which anyone who entertains the thought of a further predatory war should realize that he will be personally held responsible and that he will be personally punished."

Or in another part of this report, the following is stated literally: "....According to the International Law of the 19th and early 20th century, the waging of war was not generally considered as unlawful or as a crime in the letal sense. Summed up the prevailing doctrine held that both parties in any war were to be considered as being in the same legal situation and therefore had the same rights." The legal considerations in the report then actually conclude with following challenge: "...An attack against the fundamental principles of international relations must be considered as nothing less than a crime against the community, which rightly must protect the integrity of its fundamental agreements by punishing the aggressor. We therefore propose to rise the challenge that a war of aggression is a crime and that modern international law has abandoned the justification according to which he who instigates or wages a war acts in accordance with the law."

And asa matter of fact, it would not be necessary to raise the demand for a penal law if the action under consideration already had been threatened with punishment by existing law.

It is obvious that the fulfillment of such a demand by a court of law - regardless of whatever legal bases there may be for its proceedings - would be contradictory to a principle derived from the penal legislation of nearly all civilized nations and, which finds its expression in the rule "nulla poena sine lege", meaning thatan act can only be theobject of punishment if the punishment hasbeen provided for by a law before the act was committed. This state of affairs seems all the more remarkable, since the rule "nulla poena sine lege" is a principle anchored in the constitution of practically all civilized nations. Thus for example, it is contained in Article 39 of the English Magna Charta of King John in 1215, in the North American Constitution of 1776 and in the declarations of the French Revolution in 1789 and 1791. This principle of "nulla poena sine lege" is not only contradictory to the assumption of a crime against peace, such as is to be defined by the

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Tribunal in the further development of prevailing international law as a punishable act in the opinion of some of the prosecutors but it is also especially contradictory to create now also in the further development of international law an independent state of criminality of conspiracy by judicial opinion. In this it cannot differentiate whether this conspiracy has as its aim the commitment of a crime against the peace or the commitment of a crime against the customs of war. Also, the assumption of a common plan or an agreement to commit war crimes as an independent state of criminality is not compatible with the principle of "nulla poena singe lege". Applicable are rather here also, -- as already rightly expounded by the French chief prosecutor - the rules pertainingto participation according to the native law of the perpetrator or according to the local law of the place of perpetration. These rules

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pertaining to participation will be limited under the given circumstances to the extension of the threat of punishment for cases of complicity, instigation and assistance.

Apart from his participation in the general plan or complicity, as defined in count I of the indictment, the defendant Rudolf Hess, within the limits of his personal responsibility for war crimes and crimes against humanity, is charged by the Prosecution for the contents of only one document, i.e. document 3D-268 (R-96).

This is a letter of the Reich Minister of Justice to the Reich Minister and Chief of the Reich Chancellery of 12 April 1941, which deals with the introduction of punitive laws against Poles and Jews in the incorporated Eastern territories. The defendant Rudolf Hess plays a part therein only in so far as the letter mentions among other things that the deputy of the Fuehrer had proposed the discussion of the introduction of corporal punishment. If one takes into consideration that the staff of the deputy of the Fuehrer alone comprized 500 officials and employees and that for questions of legislation, there was a special department which dealt directly with the several ministries, it seems very doubtful, whether the defendant Rudolf Hess was personally concerned with the matter at all. In this connection I refer to the affidavit of the witness Hildegard Fath, Exhibit Hess No. 16. Considering however that the measure proposed for discussion by the deputy of the Fuehrer was not introduced, the knowledge of the defendant should not matter very much. Without it being necessary to probe any deeper into the subjective facts of the case, it can be said that, as can be deduced from the penal law of all civilized countries there is here not even an attempt. The attitude of the deputy of the Fuehrer, as shown in the letter of the Reich Minister for Justice is penally irrelevant. It may be entirely left out of consideration whether a penal law would have been violated if the measure put up for consideration had effectively found its legislative outcome in a Reich law.

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Another document submitted by the Prosecution is U.S.A. exhibit 696 (062-PS). This refers to the directives of the deputy of the Fuehrer of 13 March 1940, dealing with the instructing of the civilian population as to the proper attitude to be taken in case of landing of enemy aircraft or parachutists on German Reich territory. This is the same document for which I applied for a correction of the translation because the translation from German into English was in my opinion not correct. This document however has been included neither in the trial brief submitted by the British Prosecution nor mentioned by Colonel Griffith Jones on February 1946 when he dealt with the personal responsibility of the defendant Rudolf Hess. Considering however that this directive has been officially submitted as documentary evidence, it becomes necessary to deal with it briefly.

Occasion for this directive of 13 March 1940 was the fact that the French Government officially and by radio gave instructions to the French civilian population as to how they were to conduct themselves in case of landings by German aircraft.

On the basis of these instructions of the French Government, the Commander-in-Chief of the German Luftwaffe considered himself obliged for his part to inform also on his part the German population accordingly via the official Party channels. He, therefore, issued a directive about the attitude to be adopted in the case of landings of enemy aircraft or parachutists, which was used as appendix to the mentioned order of the Fuehrer' deputy of 13 March 1940.

This directive, however, does not contain anything which is contrary to the laws and customs of warfare, as they have been expressed, for instance, in the Hague Convention on Land Warfare. This applies particularly to No. 4, which contains the instructior either to arrest or to "render" enemy parachutists "harmless". There cannot be the slightest doubt that according to the text as well as to the spirit of No. 4, this was only meant to say

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that enemy parachutists were to be fought and annihilated in combat if they did not surrender voluntarily and tried to prevent their arrest by using force, particularly by the use of fire-arms. This becomes evident from the word "or" alone. First of all their capture was to be attempted. This alone in the interest of the Intelligence Service. Only if this was made impossible by resistance should they be "rendered harmless", that means annihilated in combat.

Any other interpretation of this instruction would not only be contrary to the text and the spirit, but

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beyond that would also be contrary to the fact that up to the French campaign the war had been waged according to the rules which had been established, among other things, in the Hague Convention on Land Warfare and that, at any rate at that time, March, 1940, the war had not yet developed into the mutual struggle of annihilation, as it was to become after the outbreak of the German-Russian war. The fact that another interpretation is absolutely impossible, is also evident from the so-called "Commando Order" of the Fuehrer, dated 18 October, 1942, which has been presented by the Prosecution under No.U.S.A. 501 (498-PS). The deliberations for this order, for which quite different reasons existed by the way, and the issuing of this "Commando Order" by Hitler himself, in spite of the opposition of the Wehrmacht High Command and the Chief of the Wehrmacht Operational Staff had been entirely superfluous, if the Commander-in-Chief of the Luftwaffe had already in March 1940 issued instructions which served the same purpose. It is furthermore expressly specified in figure 4 of the Fuehrer order of 18 October, 1942, that captured members of commando groups were to be handed over to the SD.

As the German text of this directive to the order of 30 March 1940 is completely unequivocal and does not leave aby doubt, I refrained from using additional evidence about this question. In the case, however, that the Tribunal should not share this assumption, it could not be avoided for the complete clarification of the facts that the Tribunal procure on its own initiative the instructions which the French Government issued at the beginning of the year 1940 to the French civilian population in case of the landing of German aircraft or German parachutists.

It is not necessary to deal closer with document GB-267 (PS 3245) which is also charged to the defendant Hess, as the contents of this document can under no circumstances be considered a crime against the rules of warfare or against humanity, if the above mentioned principles are admitted.

Besides as an individual person, Rudolf Hess is also accused, as a member of the SA, the SS, the corps of political leaders and the Reich Cabine[t]. As far as the membership of the SA and the SS is concerned, more detailed explanations are not necessary. From the documents presented by the

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Prosecution, it becomes evident that the defendant Hess had only the honorary title of an Obergruppenfuehrer in those two organizations. No command or disciplinary powers were connected with it.

As deputy of the Fuehrer, however, the defendant Rudolf Hess held the highest office which existed in the corps of political leaders. It cannot be my task to take theposition thatt I comment on every detail of the accusation made against the corp of the political leaders within the framework and in application of Article 9 of the Charter and which is characterized by its motion to declare the corps of political leaders as a criminal organization. Considering the fact, however, that the defendant Rudolf Hess is, although not the only political leader there was, a few fundamental remarks seem to be justified.

According to Article 9 of the Charter, the Tribunal can state to a member of an organization that the organization to which the defendant belonged was a criminal one. A prerequisite for this is, according to the Charter, that this declaration of the Tribunal is connected with an act for which the defendant is being convicted.

One can understand under an act within the meaning of Article 9 of the Charter only a personally imputed and reproachable act or failture to cat but on the other hand not the increased liability resulting from Article 6, paragraph 3 for the act of another. Since, however, neither in the Indictment nor in the trial brief dealing with the personal responsibility of the defendant Rudolf Hess, no act of any kind is imputed against him which contains the facts of a war crime or a crime against humanity, in this case a conviction of the defendant Hess, namely as a member of the corps of political leaders, would be synonimous with the establishment of a criminal responsibility for the acts or ommissions of another. Although the defendant Hess was the highest political leader and although no action is imputed against him which contains the facts of a criminal case, he is to be convicted as a member of the reputedly criminal organization of which he was the leader; it cannot be denied that this is quite an unusual legal case.

But something else appears more important. The Defense was compelled

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to attack the core of the Charter, namely Article 6, as not being compatible with the generally valid principles of international law. Article 9 of the Charter is not less in contradiction with the common legal conviction of all members of the international legal community. There exists neither a legal statue in international law nor a legal statute in any national law which declares the membership in an organization as criminal without it being examined in each individual case, whether the person concerned has made himself personally guilty by his own actions or emmissions. Contrary to the general principles of criminal law, as they are derived from the penal laws of all civilized countries, the Charter provides in Article 9 for a criminal responsibility and a collective liability of all members of vertain organizations and institutions, and this without any consideration as to whether the individual members has incurred any guilt.

The Charter thus abandons a principle which is an integral part of any modern practive of criminal law. The rule of "no punishment without guilt" and the declaration that a certain organization is criminal, is a penalty for the members affected by it, is an essential part of the consciousness of criminal law of our time, insofar as one understands by guilt the inclusion of those prerequisites of the penalty which justify the personal reprobation of the unlawful act as against the culprit. If already the fact of membership in a certain organization alone becomes the object of a sentence of criminal unworthiness, then the act which is construed as being blamable in law does not appear any more as a legally condemnable expression of the personality of the culprit. This must, in particular, apply to organizations which had hundreds of thousands, and even millions of members. Punishment without guilt has existed only amongst primitive peoples.

Liszt, who was at the same time a constructive thinker in the field of international law, says therefore appropriatedly:

"Just as religious eaching does not oppose the visiting of the sins of the fathers on the children and on the children's children, as in the dramas of the anvients blindly swaying fate and in the literature of today the law of herodity take the place of guilt, so does even the oldest law of all people

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know of no penalty without guilt."

Only in primitive law did there exist a criminal responsibility without guilt. As a matter of fact, in the history of law of all countries, the so-called criminal responsibility for the effects of crime without actual guilt was very soon replaced by the principle of responsibility for guilt only and thereby that state was reached which is alone compatible with the dignity of man. The regulation provided by Article 9 of the Charter signifies not only a deplorable contribution to the apparently irresistible trend of herding together of man, but it is moreover a return to the first beginnings of concepts of criminal law. Considering these facts it cannot be acknowledged that this provision of the Charter is in agreement with prevailing law as it is derived from the common legal convictions of all the members of the community of international law and from the general principle of criminal law of all civilized nations.

Rudolf Hess is finally accused as a member of the Reich Cabinet. In regard to his belonging to the Secret Cabinet Council, the following may be said. The presentation of evidence has shown that this Secret Cabinet Council was only created to avoid the resignation of former Reich Foreign Minister von Neurath appearing to public opinion as a breach between him and Adolf Hitler. Actually no session of this Secret Cabinet Council ever took place. The Council did not even convene in a constitutional session.

With reference to the Reich Cabinet, it is established on the basis of the results of the presentation of evidence that no cabinet meetings took plac since 1937 at the latest. The tasks to be fulfilled by the Reich Cabinet, especially the legislative functions, were taken care of by the so-called circulating procedure. The presentation of evidence has shown further that from 1937 on at the latest, the great political and military decisions of Adolf Hitler were takne exclusively by him alone without making them known beforehand to the members of the Reich Cabinet. The Reich Cabinet, as an institution since Hitler's appointment as Reich Chancellor, has probably not made any decisive decision on politically or militarily important questions

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already very long before 1937. It would be completely misleading to assume that the members of the Reich Cabinet in the National Socialist State had even an approximately similar position as it is a matter of course in a state governed by parlimentarian principles. Just as little as there was a common plan of conspiracy among the men sitting in the prisoner's dock, was there something similar within the Reich Cabinet.

It was partly even so that opposing forces became apparent within the Reich Cabinet which by themselves alone would make it impossible to arrive at an agreement for a common plan, as it was expressed in the Indictment. It is sufficient here to point to the testimony of the witness Lammers and to the fact that Adolf Hitler, from whom such facts could not remain hidden, finally issued even a prohibition with the contents, that the individual Reich Minister had no right to assemble any more for conferences on their own.

In this connection, something else cannot be left unmentioned. If the presentation of evidence in this trial produced anything with certainty,

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then it is the proof of the position of enormous political power and the unimaginable authority which Hitler had within the German governmental system. When General Jodl testified on the witness stand that there was no one who could contradict Hitler in the long run and that there could not exist anyone, then one may say that he hit the nail right on the head with a few words. This may perhaps be regrettable, but one cannot alter anything of the fact as such. If one now keeps also in view that this dominant position of Hitler became always greater during the years, then this alone should be sufficient to exclude the assumption of a common plan, as it is asserted in the Indictment.

In any case, the following must be said: The former party leaders, generals and members of the cabinet indicted before this Tribunal are accorded in this trial an importance because of Hitler's death which they actually did not have in public life of the past. While the entire politica life was overshadowed in Germany during the past twelve years by the overwhelming influence of Hitler's personality, the absence of this man from the prisoners' dock affects this trial in a manner which undoubtedly must result in an entirely distorted picture of the political reality of the past twelve years.

Your Honors, I come now to the event which was to conclude the political career of the defendant Rudolf Hess -- his flight to England on 10 May 1941. This enterprise is of considerable importance as relevant evidence in this trial. As is shown by the presentation of evidence, the defendant Rudolf Hess had made the decision for this flight as early as June 1940 -- that is, immediately after the surrender of France.

The execution of the plan was delayed for a number of reasons: especially certain technical conditions had to be fulfilled in advance. Besides, considerations of political nature played a part, namely, that such an enterprise could be accompanied by success only when political situations and especially the military position appeared favorable for the preliminary arrangements of peace negotiations, for reestablishment of peace was undoubtedly the aim which Hess pursued by his flight to England.

When the defendant Hess was led before the Duke of Hamilton on the day after his landing, he explained to thelatter, "I come on a mission of humanity." During the conversation which the defendant had with Mr. Kirkpatrick of the Foreign Office on 13, 14 and 15 May, he explained to him in detail the motives which had induced him to take this extraordinary step. At the same time, he brought to his knowledge the conditions under which Hitler would be prepared to make peace.

On 9 July 1941 a conversation took place between Rudolf Hess and Lord Simon, who appeared on the instructions of the British Government. I submitted the transcript of this conversation to the Tribunal as evidence and am referring to it.

It is shown by this document that the motive for this extraordinary flight was the intention to avoid further bloodshed and to create favorable conditions for the introduction of peace negotiations. During the course of this conversation, the defendant Hess handed a document to Lord Simon which stated the four conditions under which Hitler would have been prepared at that time to conclude peace with England. The conditions were:

"1. In order to prevent future wars between the Axis and England, a delimitation of spheres of interests is proposed. The sphere of interests of the Axis powers is to be Europe, and that of England its Colonial Empire.

"2. Return of the Germancolonies.

"3. Indemnification of German nationals who were domiciled prior to or during the war in the British Empire and who suffered damage to life or property because of measures taken by a government in the Empire, or through incidents such as pillage, riots, etc. Indemnification to British nationals on the same basis by Germany.

"4. Conclusionof an armistice and peace treaty with Italyat the same time."

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Rudolf Hess explained to Mr. Kirkpatrick, as well as to Lord Simon, that such were the terms on which Hitler was prepared to make peace with Great Britain immediately after the conclusion of French Campaign and that this position of Hitler had undergone no further change since completion of the campaign against France. There are no indications of any kind why this account of the defendant should not appear plausible. On the contrary, it tallies very well withmany declarations which Hitler himself had made on the subject of relations between Germany and England. In addition to that, the defendants Goering and von Ribbentrop confirmed also while in the witness box that the terms which Hess disclosed to Lord Simon corresponded with Hitler's views.

The fact that the terms disclosed by Hess mention Europe as the sphere of interest of the Axis powers should not result in the conclusion that this was to mean Europe's domination by the Axis powers. The declarations made by Hess, rather, demonstrate -- they are included in written notes on the conversation between him and Lord Simon -- with all clarity that this was merely meant to eliminate England's interference in Continental Europe.

What legal consequences result from these facts?

In the Indictment, thedefendant is charged -- together with the other defendants -- with having cooperated in the psychological preparation of the German people for war. To the extent that the charge of psychological preparation for war is part of the common plan, it may suffice to refer to the remarks I have made in that connection.

However, if the Prosecution also wants to claim that the defendant Hess went further and personally engaged in this psychological preparation for war, proof to the contrary is at least offered - disregarding his numerous speeches in favor of peace -- by this flight to England and the intentions responsible for it.

Without going into detail as regards general circumstances and the personal relations between Hitler and the defendant Hess, one thing can be

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said with certainty: With his flight to England the defendant Hess accomplished a deed which in view of his position in the Party and in the State, and especially because of the fact that after Goering he was to become the Fuehrer's successor, can only be called a sacrifice, a sacrifice which Hess made not only for the sake of the German people and for the resumption of peace, but for the entire world.

This sacrifice was all the greater as Hess was one of the very few whose relation to Hitler was based on intimate personal confidence. If nevertheless the defendant decided to stake his position in the Party and everything that meant a personal bond with Hitler for the reestablishment of peace,

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this must lead to the conclusion that the defendant Hess likewise saw in war the ghastly scourge of manking and that even if this were the only reason, the results little likelihood that it was his intention to prepare the German people for war.

Your Honors, the following statements deal with the question of what lega questions are to be drawn from the flight of the defendant Hess to England and in regard to his participation in the common plan alleged by the Prosecution, particularly in view of the attitude of the defendant, to what extent penal responsibility was incurred after the flight to England. The defendant himse does not wish to have any favorable conclusions drawn for him in this trial from this flight and the intentions connected with it. He has therefore aske me to omit a part of the following statement. Nevertheless, I consider it my duty as the defense counsel to draw all the legal conclusions resulting from th flight of the defendant Hess and the intentions connected with it and to point out the facts and points of view which speak in favor of the defendant.

As I have already brought out, there is reason to assume on the basis of evidence presented, that the plan claimed by the Prosecution did not exist. I case, however, the Tribunal should judge the results of the testimony differently and in application of article 6, paragraph 3 of the Charter, shoul accept the existence of such a plan, directed towards the beginning of a war o aggression, it becomes necessary to examine the question of what legal consequences the flight of the defendant Rudolf Hess to England and what the aims it contemplated had on his participation in the common plan as asserted by the Prosecution.

To this the following can be said: Article 6, paragraph 3 of the Charter extends the criminal responsibility of the defendant to include all acts committed by any person while carrying out the common plan maintained by the prosecution. The Charter itself contains no provisions as to whether and under what conditions withdrawal from a common plan is possible. This does n justify the conclusion, however, that such a withdrawal should be excluded as matter of principle. That assumption is out of the question for the very reason that the Charter quite clearly does not purport to give an exhaustive ruling on all questions of substantive and procedural law. If a withdrawal i

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permitted in Anglo-American law as a matter of fundamental principle, this should be possible with even greater reason under the Charter. For the Charter represents a compendium of principles in which well recognized institutions of Continental European law are also given consideration. Continental European law proceeds quite unequivocally from the idea that the responsibility of the perpetrator before the penal law reaches no further than the extent to which his actions or omissions are embraced by his will. The withdrawal from the attempt, as a reason for acquittal, has therefore become an institution which can be found in almost all European codes of law. If, according to Anglo-American Law, withdrawal from the conspiracy is possible, there can be no doubt as to that possibility's existing, in principle, according to the Charter. There is all the more reason for that assumption, in that it has been a practice to apply German Law in cases where the Charter fails to establish a binding rule. As regards the defendant Rudolf Hess, there should be even less reason for doubt, because the deeds charged against the defendant Rudolf Hess took place on German Reich territory. According to generally accepted principl of law, as they find expression in particular in the so-called International Penal Code of all nations, the so-called lex loci, i.e. the law of the place where the action took place, will be binding in this case.

Applying these principles to the behavior of the defendant Rudolf Hess and to his flight to England of 10 May 1941, it follows, and the evidence did not in any case produce anything to the contrary, that no subsequent developments can be embraced by his will. His influence on the events within the scope of war developments as a whole ceased, at the latest, with his flight to England. It contradicts all principles of penal law as they derive from the codes of law of all civilized nations to hold someone responsible, according to principles of penal law for a happening over which he had no influence and was no longer able to exert influence and which his will did not adopt. In this connection reference should also be made to the Prosecution's contention that the defendant Hess did not undertake his flight to England in order to create thereby favorable conditions for peace negotiations. That, on the contrary, it was his intention -- this is the argument of the Prosecution -- thus to protect Germany's rear in its planned campaign against the Soviet Union. The documents

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submitted by the Prosecution do not permit establishment of that assumption. To begin with, this is contradicted by the fact that as early as June 1940, the defendant Hess had already decided on the flight; in other words, at a time when no one in Germany thought of a campaign against the Soviet Union. On the contrary, from the letter which the defendant Hess left behind and which was handed to Adolf Hitler at a time when Hess had already landed in England, it becomes perfectly clear that Hess had no knowledge of the imminent campaign against the Soviet Union. In this letter the defendant Hess did not state by a single word -- and this is established by testimony of the witness Fath -- that the purpose of his flight was to cover Germany's rear for the forthcoming campaign against the Soviets. In that letter Hess did not mention the Soviet Union by a single word. There is reason for the probability which almost amounts to certainty, that if Hess had had knowledge of the proposed attack, and if he had intended to combine with his flight the intention which the Prosecution now claims, Hess would have dealt with that question. In this connection I should like to refer to the Exhibit USA 875 PS 3952, which also clearly shows that Hess had no knowledge of the campaign against the Soviet Union.

But even if Hess had had definite knowledge of the proposed campaign against the Soviet Union, this would not oppose the reason for penal acquittal in regard to the later period of time. Evidence has shown that in ordering the attack against the Soviet Union, the idea of anticipating a forthcoming attack on the part of the Soviets was by no means last in Hitler's mind. I refer to the report of the American General, which I have already read.

It is immaterial within the framework of the question to be examined here, whether such an attack was actually planned by Soviet Russia and would have taken place. Statements made by the defendant Jodl while in the witness box make this appear very likely, if not even certain. The point at issue here is merely that on the basis of the reports he had before him, Hitler

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himself was of that opinion. Had the defendant Rudolf Hess been successful in creating in England the prerequisites for armistice and peace negotiations, the political and military situation in Europe would have been so fundamentally changed that under these modified conditions an attack by the Soviet Union on Germany would have appeared most unlikely, and the apprehensions entertained by Hitler would have become untenable. The attempt made by the defendant Hess by his flight to England would also maintain its character whereby penal acquittal for all that happened after May 10, 1941, incidental to the execution of the common plot claimed by the prosecution is in order, if it were argued that it was not the fear of an imminent Soviet attack which prompted Hitler in his decision, but economic pressure resulting from the situation in which Germany found herself as a result of failure of the invasion of England. With the end of the war, this embarrassing economic situation would also have come to an end; at least it would not have been so stringent.

In conclusion it may be said: in undertaking his flight to England, and considering the intentions therein bound up with the re-establishment of peace, the defendant Hess made an attempt by which he pledged his entire personality to bring about the re-establishment of peace, an attempt which obviously sprang from the desire to avoid further bloodshed at all costs. Applying principles of law such as derive from the penal codes of all nations, and especially applying German pen[illegible] -- which if doubt arises will be taken as a basis for this question -- the conclusion must be accepted that the defendant Hess's responsibility according to penal law will in any case be confined to deeds which took place prior to the flight to England.

Your Honors, the past war has brought misery upon the whole of mankind to an almost unimaginable extent; it has made Europe into a continent bleeding from a thousand wounds and left Germany a field of ruins. It appears certain that at the present stage of modern technique, humanity would not survive another world war. This would, as far as it is humanly possible to foresee, utterly annihilate civilization, which has already suffered to an inexpressible extent in this war. It appears therefore only too understandable when under these circumstances the endeavor should be made in the name of humanity struggling for its existence, to leave no method untried from the legal standpoint as well, to prevent the repetition of such a catastrophe.

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There can, however, be no doubt that the law, whatever its strength may be in social life, can only play a subordinate part in the prevention of war. This applies with limitation as long as the community of nations is composed of sovereign states acknowledging no legal order derived from a superior authority and as long as no procedure and no organization exists capable, by virtue of its own authoritative power, of legally limiting legitimate claims of nations and bringing them into harmony with one another. As long as these conditions are not fulfilled, justice cannot be in the domain of international relations the regulating force it is in national life, where it rests simply upon the power of the state, which is behind it. Tempting as it may be to try to establish at least an improved and more powerful international law on the ruins left us by the past world war, such an attempt must be doomed to failure from the outset if it does not coincide with a comprehensive new order of all international relations and if international law is not simultaneously an essential component of an order which guarantees the indispensable rights of all nations and which assures in particular the satisfaction of the legitimate claims of every nation to a proportionate share of the material wealth of the world. The Charter of the International Military Tribunal is undoubtedly not part of such a general new order. It was enacted by the victorious powers for a limited duration, namely as a foundation for a criminal trial against the statesmen, military commanders and economic leaders of the defeated Axis powers. The contents of the London Agreement makes the Charter of the International Military Tribunal, which constitutes an essential part of the agreement, appear as a legislative measure ad hoc by reason of the very time limit of one year stipulated by Article 7. As a matter of fact, it can scarcely remain doubtful that essential parts of the Charter are not in accordance with the general sentiment of all members of the international legal community and that they do not therefore constitute a really valid international code. Under these circumstances, a conviction for a crime against the peace and for participation in a common plan to initiate a war of aggression could only take place at variance with the prevailing international law if the Tribunal decided, violating the principle Nulla poena sine lege, upon a juridical extension of international law. Great as this temptation may be, its consequences would

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be incalculable. Not only a principle would be violated which is derived from the principles of the penal codes of all civilized nations and constitutes in particular an integral component of international law, namely that an act can be penalized only when its penal character has been juridically specified prior to the commission of the act; but above all, in view of the fact that in the present trial the jurisdiction on counts I and II of the indictment excludes the competence of the Tribunal so far, the violation of the principle Nulla Poena sine lege, combined with these special circumstances, must put the concept of law in doubt altogether.

If the way for a genuine progress of international legislation is not to be obstructed, then the actual international code which is now valid must exclusively be considered as the legal foundation for the judgment of this Tribunal.

THE PRESIDENT: The Tribunal will now adjourn.

(The Tribunal adjourned until Friday 26 July 1946, at 1000 hours.)